87-1978

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,

Petitioners,

VS.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTOWN, KERRY GRANT, BARBARA BARD, MICHAEL K. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, Individually and in Their Official Capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER SUMMARY JUDGMENT CAN BE GRANTED BEFORE ANY DISCOVERY IN FREE SPEECH AND CIVIL RIGHTS ACTIONS?

2. FAILURE TO FOLLOW ESTABLISHED RULE THAT PLAINTIFFS NEED NOT EXHAUST ADMINISTRATIVE REMEDIES BEFORE RESORT TO FEDERAL COURTS FOR VIOLATION OF CONSTITUTIONAL AND FEDERAL RIGHTS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND CERTIORARI SHOULD BE GRANTED.

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STATEMENT OF THE CASE

Petitioners are tenured professors at Southern Connecticut State University. Both are Asian Indians and are U.S. Citizens. As members of the Department Evaluation Committee (hereinafter DEC), they discharged their functions of evaluating the Faculty members. As part of the verification of credentials, the DEC contacted the Georgia Board of Accountancy which licensed O'Hara as a Certified Public Accountant, a qualification required for the position. DEC found that O'Hara did not have proper credentials for the renewal of her contract for a teaching position and recommended non-renewal. The Administration overruled the DEC finding and renewed O'Hara's contract.

Immediately thereafter, on April 26, 1985, O'Hara, along with two others, (hereafter referred to as complainants)

complained to the Academic Freedom Committee (hereafter AFC) that petitioners along with Professor Buck were violating their academic freedom. The AFC panel consisting of 6 members dismissed 18 out of 22 charges in the complaint on Jan. 13, 1986 and scheduled a hearing for March 3, 1986. The hearing for that date was cancelled and a new date, May 16, 1986 was set by the convenors and the parties were notified. Petitioner Mehta informed the Panel that he would be out of the country on May 16, 1986 and requested an adjournment. On May 7, 1986, petitioner Narumanchi wrote to the convenors of the AFC panel complaining that his grievance representative did not receive clarifications and copies of the complaints and to give him enough time to attend the hearing after receipt of the clarifications and copies of the documents. The convenors acknowledged receipt of the letter on May 12, 1986 and advised Narumanchi that the

hearing will occur as scheduled. No reference was made to the requested documents and such documents were never made available to Narumanchi.

The AFC conducted its hearing on May 16, 1986 and allowed the complainants to testify not only to the 4 charges that it retained for hearing but all the 22 charges and whatever other complaints spontaneously stated. AFC made its findings and recommended that the administration of SCSU shall devise alternative evaluation committees so that Mehta, Narumanchi and Buck would not evaluate the complainants, that the evaluations already in the personnel files of the complainants be expunged, and ordered Mehta, Narumanchi and Buck to refrain from restricting the academic freedom of the complainants. Following such order, the Administration found it necessary to discipline Mehta and Narumanchi notified them of intended

suspension.

In an action by Narumanchi against the Board of Trustees of SCSU pending at that time in the U.S. District Court, (Civil Action No. H86-51 PCD), CSU filed a notice of proposed imposition of discipline against Narumanchi on Aug. 15, 1986. Narumanchi then filed this civil action on September 4, 1986 and a grievance with the President's Grievance Committee on or about September 10, 1986. In the grievance as well as in the complaint to the District Court, Narumanchi questioned the validity of the actions of the AFC because of the overbreadth of the clause under which it acted, and complained, inter alia, of conspiracy to deprive him of civil rights under section 1985 (3) of Title 42, U.S.C. violations of sections 1981 and 1983 of Title 42, U.S.C. and deprivation of liberty and property without substantial and procedural due process and retaliation

for exercising his free speech rights. Mehta joined him as co-plaintiff in the federal court action.

The President's Grievance Committee, which reviewed the grievance made its decision on October 8, 1986. The Committee dismissed 11 of the claims in the grievance as not covered by specific articles of the Collective Bargaining Agreement and upheld the AFC decision in other respects.

On or about October 16, 1986, this action initially before Judge Eginton, was transferred to Judge Dorsey, who already had Narumanchi's case before him with Docket No. 86-51 (PCD).

Petitioners made a motion to amend the complaint to clarify certain parts of the complaint and to add a count based upon the violation by the respondents of the petitioners' rights to freedom of speech guaranteed by the First Amendment of the U.S.Constitution and Title 42 of the U.S.

Code section 1983. This motion was granted on December 10, 1986 subject to the condition that petitioners shall have no further discovery. [Appendix E]. There were no reasons or findings in that order. Judge Dorsey, by a ruling dated January 28, 1987, granted respondents' motion for summary judgment dismissing the complaint. [Appendix D]. Judge Dorsey essentially relied upon his opinion in the related case [Appendix F] and the Second Circuit affirmed his judgment on December 9, 1987. [Appendix C]. Petition for rehearing was denied on March 1, 1988. [Appendix A]. A mandate was issued on March 7, 1988. [Appendix B].

Jurisdiction in the District Court was obtained under section 1343 of Title 28, U.S.C. and jurisdiction of this court is sought under section 1254(1) of Title 28.

PRELIMINARY STATEMENT

Petitioners' claims of retaliation for the exercise of free speech and violations of other constitutional rights were dismissed by the grant of summary judgment to respondents by Judge Dorsey of the United States District Court of the District of Connecticut by a final judgment dated February 2, 1987. Judge Dorsey's reasons are contained in an opinion dated January 28, 1987 [Appendix D]. The Second Circuit affirmed Judge Dorsey's judgment on December 9, 1987 and denied a Petition for Rehearing on March 1, 1988. [Appendix A, C]. A mandate was issued on March 9, 1988. A Petition for Rehearing In Banc was submitted on April 29, 1988. In its summary order, the Second Circuit referred to the first amendment claims and stated: "... [w]e find that in its opinion dated January 28, 1987, the district court incorporated

its ruling on that subject in the related case of Narumanchi v. Board of Trustees, H-86-51(PCD)". [Appendix C]. The Second Circuit found the other arguments meritless.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

POINT I

WHETHER SUMMARY JUDGMENT CAN BE GRANTED BEFORE ANY DISCOVERY IN FREE SPEECH AND CIVIL RIGHTS ACTIONS

This Court has not definitively decided the question whether summary judgment is appropriate before any discovery was had. The United States Court of Appeals summarily affirmed the District Court's opinion without specifically stating its reasons. That there was no discovery in the action was brought to the attention of the Court, but not raised as the main point for the appeal. This issue is so important that

in the Proposed Revision of Rule 56 by Hon. William W Schwarzer, the new subdivision (e) deals with discovery only. 110 F.R.D. 213, 214.(1988).

THE PROCEEDINGS BELOW:

The addition of the first amendment count to the complaint was specifically authorized by the District Court on December 10, 1986 conditionally that no discovery shall be had. [APPENDIX E 21A-22A]. No reasons were stated in that order. The record also shows that petitioners never had any discovery in this case and that they were foreclosed from obtaining any discovery by Judge Dorsey's order. After so foreclosing, the District Court granted summary judgment within six weeks without a hearing. The action was dismissed within five months of its commencement. There was no pretrial conference relating to discovery.

The District Court by Judge Dorsey paraphrased some of petitioners' claims in the amended complaint thus:

> "Plaintiffs further claim that defendants' actions in overturning plaintiffs' actions against the complainants constitutes a deprivation of their first amendment rights, Complaint at #XLVI, and is a retaliation for their first amendment rights. Complaint at #L. Lastly, they claim that the grievance procedure is overly broad and violative of their rights. Complaint at # XLIX."
> [Appendix D, 14A].

In granting summary judgment, the District Court referred to the discussion of the due process and equal protection claims in its opinion in the related case [Appendix F], but failed to address the retaliation for the exercise of First Amendment claims.[Appendix D].[1] Judge Dorsey referred to the discussion at pages 6-9 of his October 6, 1986 opinion relating to due process, but those pages did not have any reference to the First Amendment rights.[2]

The ruling recited the consolidation of this case with the pending case of one of the two petitioners, the three motions made by respondents and also a reference to the amended complaint. [Appendix 14A-15A]. The ruling did not find the absence of any material facts nor any delay by petitioners in completing discovery. The District Court relied on Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. at 2552-53, 98 L. Ed. 2d 992 (1986), and granted summary judgment on the basis that petitioners "failed to produce any facts whatsoever to substantiate their claims that the university procedure is unconstitutional". [Appendix D, 19A].

ARGUMENT: MOTION FOR SUMMARY JUDGMENT

Rule 56 (c) deals with the motion procedure for summary judgment. Judgment may be granted only if there is "no genuine issue of material fact" and if

the moving party is "entitled to a judgment as a matter of law." In Anderson v. Liberty Lobby, 477 U.S.242, 106 S.Ct. 2505, 2513, 91 L.Ed. 2d 202 (1986), Justice Rehnquist [now the Chief Justice], laid down the standard for motions for summary judgment. He stated: "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.", at 2552-2553. He further discussed the need for the opposing party to go beyond the pleadings and by affidavits or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a

genuine issue for trial, construing Rule 56(e). Because the nonmoving party can oppose the motion by "any" of the kinds of evidentiary materials listed in Rule 56(c), a decision on a motion for summary judgment is appropraite after completion of discovery.

Subdivision (f) of this rule gives the court discretion to grant appropriate relief when the opposing party is unable to present facts essential to justify the opposition. This court interpreted Rule 56(f) to provide for limited discovery as compared to that under Rule 26 which provides for broad pretrial discovery. First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 265, 88 S.Ct. 1575, 1581, 20 L.Ed. 2d 569 (1968). However, some discovery must be had before grant of summary judgment unless the issue concerns matters entirely

within the opponent's control. Gieringer v. Silverman, 731 F. 2d 1272 (7th Cir. 1984).

One of the most common reasons offered under Rule 56(f) for being unable to present specific facts in opposition to a summary judgment motion is insufficient time or opportunity to engage in discovery. 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, p. 541. Justice Rehnquist dealt with premature motions for summary judgment thus: "Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery."Celotex, supra, at 2554-55. Thus, the majority of this Court fully analysed and found that discovery must be

had before a draconian order completely dismissing the complaint is made.

In his Proposed Revised Text of Rule 56, Judge William W. Schwarzer provided for a subdivision for "Discovery" and in his excellent commentary, he observed: " Usually, however, the question is whether the opponent has had an adequate opportunity to discover evidence demonstrating the existence of a genuine issue of material fact. The opponent's access to discovery for that purpose is the corollary of its obligation to present specific facts in its opposition to the motion." Schwarzer, at 221. While noting that the opponent's right to discovery is not unqualified, Judge Schwarzer discussed the situations in which discovery may be denied. He cited VISA v. Bankcard Holders, 784 F. 2d 1472 (9th Cir. 1986), where denial of discovery is found to be abuse of

discretion.

Case law on this issue is clear from various opinions. See U.S. v. Price, 577 F. Supp. 1103, 1115,(1983) citingWright & Miller;Argus Inc. v. Eastman Kodak Co., 552 F. Supp. 589(1982):City of Rome v. U.S.450 F. Supp. 378(1978): Smith v. Community Federal Savs. & Loan Assn. of Tupelo, 77 F.R.D.668 (1977).

The District Court, by denying any discovery and without providing for a hearing on the motion for summary judgment prematurely and hastily "railroaded" petitioners. The specific denial of discovery indicates that there was a request for discovery. The affirmance by the Court of Appeals is equally in error and in conflict with the established law in the Second Circuit. InQuinn v. Syracuse Model Neighborhood Corp. 613 F. 2d 438, 445, (2d Cir. 1980), the Court found: "Judge Munson's

decision, after oral argument on the motions, to treat defendants' motions as a request for summary judgment denied plaintiff a reasonable opportunity to elicit information within the control of his adversaries. At least when the party opposing the motion has not been dilatory in seeking discovery, summary judgment would not be granted when he is denied reasonable acceess to potentially favorable information. See Schoenbaum v. Firstbrook, 405 F. 2d 215, 218 (2d Cir. 1968)(en banc), cert. denied sub nom., Manley v. Schoenbaum, 395 U.S. 906, 89 S.Ct. 1747, 23 L. Ed. 2d 219(1969): Illinois State Employees Union v. Lewis, 473 F. 2d 561, 565 (7th Cir. 1972), cert. denied, 410 U.S. 928, 943, 93 S. Ct. 1364, 35 L. Ed. 2d 590 1973); 6 Moore's Federal Practice #56.-15[5]: cf. Fed. R. Civ. P. 56(f). See generally, Judge v. City of Buffalo, 524 F. 2d 1321(2d Cir.

1975)."

NEED FOR DISCOVERY - DISCRIMINATION AND CIVIL RIGHTS CLAIMS

That there was need for discovery in this case was not in question. The amended complaint alleged that the two Asian Indian Professors were disciplined differently from other Professors. [Appendix G, 95A]. The only other Professor who was mentioned in the complaint was Professor Buck, a White American. If Buck was not disciplined in the same manner as the petitioners, they have presented a race, color and national origin discrimination claim under the criteria enunciated in McDonnell Douglas v. Green, 411 U.S.792, 93 S.Ct. 1817, 36 L.Ed. 2d 668(1973). It was the burden of defendants to rebut that prima facie claim of discrimination. The affidavit presented by Newtown in support of the motion did not present any facts to rebut

such prima facie discrimination complaint. No inference was drawn in favor of petitioners, the opposing party required by Anderson, supra 106 S.Ct.at 2513; United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed. 2d 176 (1962) (per curiam); Quinn, supra at 445. Deposition of the respondents would have revealed their knowledge of prior law suits, discrimination complaints, tenure questions and senate recall of petitioner and other reactions by respondents and whether such knowledge or participation motivated them to discipline the petitioners. Retaliation for complaints of discrimination is as much prohibited as retaliation for the exercise of free speech rights.

FIRST AMENDMENT RIGHTS

The threshold question in every civil rights action is whether the plaintiff has alleged facts, which if accepted as

true, would amount to the deprivation of some right secured him by the Constitution or laws of the United States. Hoover v. Holston Valley Community Hospital, 545 F. Supp. 8(1981), citing Martinez v. California 44 U.S.277, 284, 100 S. Ct. 553, 558, 62 L. Ed. 2d 481, 488-89(1980). "Summary judgment is inappropriate where the allegation is that action was taken in retaliation for an exercise of constitutionally protected freedoms." Donahue v. Windsor Locks Bd. of Fire Com'rs, 834 F. 2d 54, 59 (2d Cir. 1987). Petitioner Narumanchi sufficiently pleaded a first amendment claim in the case pending at the time of this decision. The events alleged in this case were during the time the first case was sub-judice. In both cases, petitioner alleged retaliation for the exercise of free speech and academic freedom rights. The AFC findings which were the basis for

the proposed disciplinary action in questions read in part:"

"At her hiring interview with Narumanchi and Mehta Professor O'Hara presented her expired Georgia accountancy license and her CPA certificate. At that time she explained that she had let her license expire because she was not practicing or planning to practice. At that time Narumanchi and Mehta recommended O'Hara be hired. Later, Narumanchi publicly accused Professor O'Hara of not being a CPA and demanded she be terminated for falsification of credentials. Dean Anisman investigated and found these charges untrue. The next year Narumanchi renewed his charges and also brought them to the attention of the Georgia accountancy board. the Georgia board dismissed Narumanchi's charges and has renewed Professor O'Hara's license. Narumanchi's charges have also appeared widely in Connecticut newspapers."

In the case pending before him, in October 1986, Judge Dorsey found "the organization of the School of Business Economics and the credentials of Martha F. O'Hara are matters of public concern". Narumanchi, supra 43 FEP Cases, at 819. [Appendix F, 43A]. The AFC finding above cited also referred to the credentials of O'Hara and the publication of issues

relating to such credentials in Connecticut newspapers. Criticism is "core" speech squarely encompassed within the First Amendment. Trotman v. Bd. of Trustees of Lincoln Univ. 635 F. 2d 216 (3rd Cir. 1980). Even if Narumanchi's statements to the newspapers were not true, "the First Amendment generally prtoects false statements unless they were made knowingly or with a wreckless disregard for the truth".Pickering v. Board of Education, 391 U.S.563, ___ , 88 S. Ct. 1731, 1738, 20 L. Ed. 2d 811, ____ (1968);Gates v. City of Dallas, 729 F. 2d 343, 346(5th Cir. 1984).

Petitioner Narumanchi's reference to the Georgia Accountancy Board and the publication of his charges against O'Hara in Connecticut newspapers fell within the first amendment's protective ambit. Whether the respondents retaliated for

such exercise of his constitutional rights are questions for jury and should not be decided summarily. On a motion for summary judgment a court "cannot try issues of fact; it can only determine whether there are issues to be tried". Heyman v. Commerce & Industry Ins. Co., 524 F. 2d 1317, 1319-20. (2d Cir. 1975). "[T]he point is only that the issue must be resolved by the trier of fact".Musso v. Hourigan, 836 F. 2d 736, 743 (2d Cir. 1988).

Further, "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmoving party is to be believed, and all justified inferences are to be drawn in his favor.", Anderson supra, 106 S.Ct. at

2513 citing Adickes v. S.M.Kress Co. 398 U.S. 144, 158-159, 90 S. Ct. 1598 (1970).The burden falls on the moving party to establish that no relevant facts are in dispute. Donahue supra, at 57, citing Heyman v. Commerce & Industry Ins. Co.524 F. 2d 1317, 1319-20, (2d Cir. 1975); andAdickes,supra, 398 U.S. at 157.

To recover on a first amendment claim under section 1983, a plaintiff must demonstrate that his conduct is deserving of first amendment protection and that the defendant's conduct was motivated by or substantially caused by his exercise of free speech. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). In a retaliation claim essential elements are motive and intent. The only affidavit presented by respondents in support of their motion referred to the actions having been taken in good faith.

Such bland assertion cannot refute the allegations of retaliation in the verified complaint. Judge Dorsey himself found that the "allegations preclude a finding, as a matter of law, that defendants necessarily acted in good faith" in the companion case, Narumanchi supra , 43 FEP Cases at 821. He, thus, conceded that a trial was necessary. A jury could find that respondents deprived or agreed to deprive Narumanchi of his constitutional rights which produced a chilling effect on him as well as co-petitioner Mehta. In any case, the Judge did not have a complete record on which to pass. Judge Dorsey's reasoning that the first amendment claims were premature is equally fallacious because ripeness doctrine rarely has stood as an impediment to a litigant challenging laws regulating speech. LILCO v. Mario M. Cuomo, et al.,666 F. Supp. 370 ( ).

If statutes cannot be impediments, a contract has no better standing.

Similarly, dismissal of the conspiracy claim was in error. In the second foot note, Judge Dorsey stated: "Although plaintiffs generally allege a conspiracy and violation of the equal protection of the laws, they fail to cite the relevant statute." [Appendix D, 20A, f.n.2]. Plaintiffs-appellants did include all the elements of a conspiracy including state action under section 1985 of Title 42. Discovery is essential for a claim relating to conspiracy to violate civil rights.

Where, as here, the Court is called upon to decide questions of constitutional law without the benefit of a trial, the adequacy of the record is particularly important. Felix v. Young, 536 F.2d 1126, 1134 (6th Cir. 1976); Smith v. City of Manchester, d.C.Tenn.

460 F. Supp. 30, 36. Here, the record was incomplete because of the denial of discovery. This Court should give direction to the Judiciary enunciating the circumstances under which summary judgment can be granted without discovery.

POINT II

FAILURE TO FOLLOW ESTABLISHED RULE THAT PLAINTIFFS NEED NOT EXHAUST ADMINISTRATIVE REMEDIES BEFORE RESORT TO FEDERAL COURTS FOR VIOLATION OF CONSTITUTIONAL AND FEDERAL RIGHTS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND CERTIORARI SHOULD BE GRANTED

Plaintiffs adequately alleged violations of due process, equal protection, civil rights and conspiracy to deprive civil rights in their amended complaint and demanded relief under section 1983 of Title 42 U.S.C. Judge

Dorsey, granting summary judgment again referred to his prior ruling on October 6, 1986 and found that petitioners' arguments, generally, that the grievance procedure was overbroad was baseless. [Appendix D, 17a-18A]a. He based his decision on the availability of appeal procedures for the procedural discrepancies involved with the hearing procedures. The Court of Appeals for the Second Circuit affirmed this opinion without discussing the legal issues or any other reasoning. Such affirmance is clearly in conflict with Patsy v. Board of Regents of the State of Florida, 457 U.S.496, 102 S.Ct. 2557, 73 L.Ed. 2d 172 (1982) and should be reversed.

Time and again this Court has considered issues relating to exhaustion of administrative remedies before bringing an action in federal courts for violation of constitutional or federal

rights by persons under color of state laws under section 1983 of Title 42 U.S.C. The most authoritative of these decisions has been the landmark case of Patsy.

CONFLICT WITH THIS COURT'S OPINION:

The decision below regarding the discrimination claim is in conflict with Patsy. The facts in this case are very similar to the facts in Patsy. At p.6 of his October 6, 1986 ruling which was incorporated by reference in the January 28 ruling, Judge Dorsey referred to the racial discrimination claim. He said that Article III of the Collective Bargaining Agreement [hereinafter Agreement] permitted employees to file a complaint with the Non-Discrimination Committee. He further stated that the employee may pursue state and federal grievance procedures if the committee does not sustain the allegation of

discrimination. Patsy involved a similar question whether an employee alleging that the employer denied her employment opportunities solely on the basis of race and sex. The Fifth Circuit found that the employee was required to exhaust "adequate and appropriate" administrative remedies and this court by an opinion written by Justice Marshall reversed the Fifth Circuit opinion and categorically stated that "exhaustion of administrative remedies should not be required as a prerequisite to bringing an action pursuant to #1983". By analogy, non-statutory grievance procedures do not have any better standing and need not be exhausted.

GRIEVANCE PROCEDURE - NONEXCLUSIVE

Further, unlike Winston v. United States Post Office, 585 F. 2d 198 (7th

Cir. 1978), relied upon by the District Court, the Agreement herein did not provide for an exclusive remedy. Under the heading "GRIEVANCE PROCEDURE", section 14.8 Reservation of Individual Rights., the section read:

"Nothing contained in this Agreement shall be construed to limit the rights of individual grievants or the CSU-AAUP to assert claims against the Board or Administration in any court or administrative agency of competent jurisdiction where such claims derive provision or regulation or from any other source, including individual agreements, unless such claims derive solely and exclusively from this Agreement.

"If a grievant seeks relief for a grievance by judicial means outside the grievance procedure described herein, the processing of his grievance through this internal procedure shall cease, unless both CSU-AAUP and management agree otherwise."

A reading of the above section clearly shows that claims of violations of the United States Constitution or federal statutes are not subject to the grievance mechanism because they have different origins and the agreement

reserved such rights to be pursued in courts. In construing the relationship between Title VII claims and Collective Bargaining agreements, this Court observed in Electrical Workers v. Robbins & Myers, Inc. 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed. 2d 427 (1976) that it would not be inconsistent with Title VII to decline to toll the statute of limitations during labor grievance or arbitration procedures because "contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII `have legally independent origins and are equally available to the aggrieved employee.'" Id., at 236, 97 S.Ct., at 447, quoting Alexander v. Gardner- Denver Co., 415 U.S.36, 52, 94 S.Ct.1011, 1021, 39 L.Ed. 2d 147 (1974). "The District Court's conclusion that state remedies should be utilized before resort to the federal courts may be an

entirely sound and sensible observation, but in our opinion it does not square with what must be presumed to be congressional intent in creating an independent federal remedy". Board of Regents v. Tomanio, 100 S.Ct.1790, 1798 (1980), cited with approval inPatsy.Since no effective remedy can be granted under the agreement for violation of constitutional rights, Judge Dorsey's decision based on the adequacy of the grievance procedures is in error and the Second Circuit also failed to follow this Court's rulings in affirming the decision. See also, McDonald v. City of West Branch, Mich. 104 S.Ct. 1799 (1984), and Gonzalez v. Shankar,533 F.2d 832 (2d Cir. 1976).

The state courts of Connecticut do not require exhaustion of procedures under the collective bargaining agreement before asserting non-contractual claims.

In Fetterman v. University of Connecticut, 192 Conn.530, 473 A. 2d 1176 (Sup. Ct. Conn. 1984), the Supreme Court of Connecticut dealing with the same agreement in issue within, rejected the exhaustion of remedies defense and addressed the merits of the controversy. See also, School Administrators Association of New Haven v. Dow, 200 Conn. 376 (1986). TheDowcourt held that, even in situations where employees would normally be expected to exhaust their contractual remedies, exhaustion would not be required if the agreement did not make the grievance-arbitration process the exclusive remedy for the parties. Citing Republic steel Corporation v. Maddox, 379 U.S. 650, 657-58, 85 S. Ct. 614, 13 L.Ed. 2d 580(1965). Id. at 383-384, n.5.

Since no discussion regarding free speech can be found in Dorsey's opinion,

his discussion in the opinion in the related case should be found as the basis for his dismissal. There, after finding that the pleading was sufficient, he referred to the grievance procedure and stated that "plaintiff has failed to present any facts which would prove that the seemingly proper grievance procedure is inadequate as applied, according to due process standards". 43 FEP Cases, 814, 819. That the procedure was inadequate can be seen from the allegations in the complaint that petitioners did file a grievance and that it was dismissed.[Appendix G, 87A-91A]. No appeal was possible under the agreement.

The opinion below is also in conflict with the opinions of the Second Circuit in Russo v. Central School District No.1, 469 F. 2d 623 (2d Cir. 1972) and Gonzalez v. Shanker, 533 F. 2d (2d Cir. 1976).

There the Court held that the provisions of the contract did not provide adequate remedy and as such, there was no need to exhaust grievance procedures. The Second Circuit dutifully followed Patsy in other cases.

ACADEMIC FREEDOM

The decision below failed to address the academic freedom issued by the two teachers. Dorsey misread the allegations in the complaint regarding the overbreadth and vagueness of the Academic Freedom Complaint as referring to the overbreadth and vagueness of the grievance procedure. The complaint questioned the validity of section 4.2.1 of the Agreement dealing with Academic Freedom as vague. [Appendix D, 100A].

The concept of "[a]cademic freedom, though not a specificaly enumerated constitutional right, long has been viewed as a special concern of the First

Amendment."Regents of the University of California v. Bakke, 438 U.S.265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed. 2d 750 (1978) (Powell, J. announcing Court's judgment and expressing his views of case). Academic freedom was the issue in a number of important cases such asSweezy v. New Hampshire,354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 1. Ed. 2d 1311 (1957);Keyishian v. Board of Regents of University of State of N.Y. 385 U.S.589, 87 S.Ct. 675, 17 L. Ed. 2d 629 (1967); Kunda v. Muhlenberg College, 621 F. 2d 532 (3d Cir. 1980);Gray v. Bd. of Higher Education,692 F. 2d 901 (2d Cir. 1982).

The balancing of academic freedom with individual rights to fair consideration has been a subject for the courts. The procedure by which the AFC found violation by the petitioners was questioned as broad. The grievance mechanism herein failed the due process

requirements because of the overbreadth and the vagueness of the Academic Freedom clause in the Agreement. In fact, the Academic Freedom Committee itself could not construe the clause properly. Article 4.2 of the Agreement dealt with Academic Freedom. [Appendix I, 144A-150A]. In its Memorandum decision dated January 13, 1986, the Academic Freedom Committee dismissed 18 complaints of academic freedom violations. In doing so, it did not elaborate on the scope of academic freedom and why such complaints were not within scope of the academic freedom. In regard to Complaint C, the Committee itself suggested civil action. [Appendix I, 146A]. The Committee's initial dismissal of these 18 complaints and later permitting the complainants to testify to all the charges in the absence of the petitioners at a hearing and sustaining those charges clearly

shows that the Committee did not know the scope of the article under which it was established and under which it functioned. Such overbreadth should be decided on a case by case basis. Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975). The Fist Circuit, in Mailloux v. Kiley, 448 F. 2d 1242, 1243 (1st Cir. 1971), found sanctions under a similar clause to be violative of due process. Recently, the Second Circuit itself, upheld the denial of summary judgment where academic freedom was part of the issue. See Mahoney v. Hankin, 844 F. 2d 64 (2d Cir. 1988). Petitioners should not be penalized under a clause that is impermissibly vague and overbroad.

PROCEDURAL UNFAIRNESS

The grievance procedures are also inadequate because of the retaliatory animus alleged to have developed between the petitioners and some of the

respondents due to prior law suits, complaints to Human Rights agencies and other vindication by petitioners of their constitutional rights. Vitek v. Jones, 445 U.S.480, 100 S.Ct.1254, 63 L.Ed. 2d 1(1976). At the time of the decision within, there was a case pending before the same court complaining of similar claims. In Withrow v. Larkin, 95 S.Ct. 1456, 1464 (1975), this Court stated: "Not only is a biased decisionmaker constitutionally unacceptable but `our system of law has always endeavored to prevent even the probability of unfairness'." The Agreement lacks the procedural attributes that would assure either accurate fact finding or satisfactory resolution of constitutional claims particularly against the background of animosity and abuse that was alleged here. See Gonzalez, supra, at p. 837-838.

The retaliatory animus was also to be inferred from the fact that appellants as members of the Department Evaluation Committee, recommended non-renewal of Mrs. O'Hara's appointment because of the falsification of her CPA license requirement. [Appendix J, 164A]. The Dean and the President refused to follow that recommendation and renewed Mrs. O'Hara's appointment. Then ensued the academic freedom complaint by Mrs. O'Hara and others. It cannot be said that there was no retaliatory animus in the way the academic freedom complaints were handled by the Academic Freedom Committee and the disciplinary actions taken by the Dean and the President against the petitioners. Because of such animus, the decision makers under the grievance procedure were not unbiased and should not have participated in the process. [3] The procedures followed by the Committee that

decided the complaints against petitioners were not in accordance with the procedures required under due process and summary judgment by the District Court was inappropriate.

"It should be noted that the retaliation doctrine does not depend on any objective expectations or claims of entitlement based on state law or contract and thus presents a different issue than that contained in a procedural due process claim". Perry, supra, 92 S.Ct. at 2697-98, cited in f.n.7, in Stone v. Bd. of Regents of University System, 620 F. 2d 526 (Cir. 1980). The adequacy of procedures or their exhaustion was not the issue presented in this case and the Court of Appeals failed to follow its own rulings.

For the above reasons, Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the

U.S. Court of Appeals for the Second Circuit.

PETITIONERS

By: Krishna M. Vempaty

KRISHNA M. VEMPATY

Attorney for PETITIONERS
1123 Broadway
Suite 302
New York, N.Y. 10010
Tel: (212) 242 3333

FOOTNOTES

_/1. Judge Dorsey failed to distinguish between free speech rights and rights relating to liberty and property by stating : "Those same procedures are equally applicable to plaintiff's claims herein and equally satisfy due process". The opinion is devoid of any reference to free speech claims. In the related case, Judge Dorsey specifically found that petitioners' speech was a matter of public concern. Narumanchi, supra, 43 FEP Cases 814, at 819. He stated: "In light of Pickering and Yoggerst, the reorganization of the School of Business Economics and the credentials of Martha F. O'Hara are matters of public concern in that both issues raise questions involving the allocation of state funds, the efficient use of those funds and the

receipt of public funds by one who may be vested with a public trust." [Appendix F, 43A]. He further stated that: "Plaintiff has sufficiently pleaded a first amendment claim." [Appendix F, 44A].He then found that the claims were premature and dismissed them by reference to the adequacy of the grievance procedure. [Appendix F, 44A-45A].

_/2 Narumanchi v. Bd. of Trustees is pending appeal in the U.S.Court of Appeals for the Second Circuit with Docket No. 87-7796.

_/3 In the Brief to the Second Circuit, even the attorneys for the respondents characterized the petitioner as "the litiguous Mr. Narumanchi". The Attorney General's characterization seems to reflect the animus of the parties he was representing.

APPENDIX

APPENDIX

A. Order of the Court of Appeals Second Circuit 1A - 2A

B. Second Circuit Mandate 3A - 6A

C. Second Circuit Opinion 7A - 9A

D. Ruling of the District Court 1,29,87 11A - 20A

E. Order of the Distrct Court 1,16,86 21A - 22A

F. Ruling of the District Court 10.6.86 23A - 66A

G. Amended Complaint 67A - 105A

H. Complaint to Academic Freedom Panel 4,26,85 106A - 142A

I. Academic Freedom Panel Decision 1.13.86 143A - 151A

J. Academic Freedom Committee Decision 5.30.86 152A - 173A

K. Statutes and Rules 174A - 182A

APPENDIX

APPENDIX A

ORDER OF THE UNITED STATES

COURT OF APPEALS

(Filed March 1, 1988)

Docket No. 87-7504

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI

Plaintiff-Appellants (87-7504)

V.

THE BOARD OF TRUSTEES OF THE CONNECTICUT

STATE UNIVERSITY, et al.

Defendant-Appellee (87-7504)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day

of March one thousand nine hundred and eighty-eight.

Present:

Hon. WILFRED FEINBERG, Chief Judge

Hon. JAMES L. OAKES,

Hon. GEORGE C. PRATT,

Circuit Judges,

A petition for rehearing having been filed herein by plaintiffs-appellants, Mohan L. Mehta & Radha R.M. Narumanchi.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,

Clerk

APPENDIX B

OPINION OF THE UNITED STATES

COURT OF APPEALS

(Filed December 9, 1987)

87-7504

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI

Plaintiffs-Appellants (87-7504)

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT

STATE UNIVERSITY, et al..

Defendants-Appellees (87-7504)

At a stated Term of the United States

Court of Appeals for the Second Circuit,

held at the United States Courthouse in

the City of New York, on the 9th day of December, one thousand nine hundred and eighty-seven.

Present:

Hon. WILFRED FEINBURG, Chief Judge

Hon. JAMES L. OAKES,

Hon. GEORGE C. PRATT,

Circuit Judges.

Appeal from United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district is AFFIRMED.

1. Appellants claim that summary judgment should not have been granted against them because their complaint was facially sufficient and therefore able to withstand a summary judgment motion accompanied by only an allegedly irrelevant affidavit. We do not think the affidavit submitted was irrelevant since it rebutted allegations of racial discrimination, denial of equal protection, and lack of due process.

2. Appellants claim that the district judge never ruled on their first amendment claims. However, we find that in its opinion dated January 28, 1987, the district court incorporated its ruling on that subject in the related case of Narumanchi v. Board of Trustees, H-86-51 (PCD).

3. We affirm for the reasons given in Judge Dorsey's January 28, 1987,

opinion. We have considered all of the appellants' arguments for reversal and find them meritless.

ISSUED AS MANDATE: March 9, 1988

APPENDIX C

OPINION OF THE UNITED STATES

COURT OF APPEALS

(Filed December 9, 1987)

87-7504

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI

Plaintiffs-Appellants (87-7504)

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT

STATE UNIVERSITY, et al..

Defendants-Appellees (87-7504)

At a stated Term of the United States

Court of Appeals for the Second Circuit,

held at the United States Courthouse in the City of New York, on the 9th day of December, one thousand nine hundred and eighty-seven.

Present:

Hon. WILFRED FEINBURG, Chief Judge

Hon. JAMES L. OAKES,

Hon. GEORGE C. PRATT,

Circuit Judges.

Appeal from United States District Court for the District of Connecticut.

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ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district is

AFFIRMED.

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2. Appellants claim that the district judge never ruled on their first amendment claims. However, we find that in its opinion dated January 28, 1987, the district court incorporated its ruling on that subject in the related case of Narumanchi v. Board of Trustees, H-86-51 (PCD).

3. We affirm for the reasons given in Judge Dorsey's January 28, 1987,

opinion. We have considered all of the appellants' arguments for reversal and find them meritless.

WILFRED FEINBERG, Chief Judge

JAMES L. OAKES,

GEORGE C. PRATT,

Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX D

RULING OF THE UNITED STATES

DISTRICT COURT

(Filed January 29, 1987)

UNITED STATESS DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL ACTION NO. N-86-302 (PCD)

MOHAN L. MEHTA, et al.

Plaintiffs,

v.

BOARD OF TRUSTEES OF THE CONNECTICUT

STATE UNIVERSITY, et al.

Defendants.

RULING ON MOTION TO DISMISS OR IN THE

ALTERNATIVE FOR SUMMARY JUDGEMENT

Facts and Procedural History

Plaintiffs allege in their amended complaint of December 10, 1986, that defendants, "acting individually and in concert ... under color of state law ... are responsible for depriving the plaintiffs of their rights, privileges, and immunities secured to them by the Constitution and laws of the United States." Complaint at # VIII. Specifically, they claim that the order of the Academic Evaluation Committee instructing the university administration to devise alternative evaluation committees to evaluate Professors Wafeek Abdulsayed, Richard Fahringer and Martha O'Hara ("complainants") rather than allow plaintiffs to evaluate them, the order compelling the university to remove the pejorative statements made by plaintiffs about the complainants from their files, and the order disciplining plaintiffs for

the actions taken in relation to the complainants should be rescinded. Complaint at ## X, XI, XII, XIII. They claim defendants' actions constituted violations of their property rights "to continued employment without implementation of discipline and the right to seek promotional positions which would place them in a position of authority over the complainant professors." Complaint at # XXXIV. They also claim that their contract rights to evaluate the complainant professors as members of the Department Evaluation Committee have been violated, Complaint at # XXXV, and their liberty interest has been violated because their reputation in the academic community has been damaged. Complaint at # XXVI. In ## XXXVIII, XXXIX and XL they claim that defendants' failure to reschedule the Academic Evaluation Committee hearings at a time

which was convenient for them and the committee's decision to hear arguments against them beyond the issues of which they were given notice deprived them of due process and their right to equal protection of the laws. Plaintiffs' further claim that defendants' actions in overturning plaintiffs' actions against the complainants constitutes a deprivation of their first amendment rights, Complaint at # XLVI, and is a retaliation for their first amendment rights. Complaint at # L. Lastly, they claim that the grievance procedure is overly broad and violative of their rights. Complaint at # XLIX.

On October 15, 1986, Narumanchi v. Board of Trustees, Civil No. H-86-51, and Mehta v. Board of Trustees, Civil No. N-86-302, were consolidated. On October 16, 1986, defendants moved to dismiss the complaint in Mehta. Plaintiffs did not

respond. On November 24, 1986, defendants moved for summary judgement in Mehta. Plaintiffs did not respond. On December 17, 1986, in response to plaintiff's amended complaint, defendants again moved for summary judgement. Plaintiffs did not respond. On December 16, 1986, subsequent to a hearing, it was ordered that all motions to dismiss and for summary judgement shall be decided on the record as of December 31, 1986. Plaintiffs did not respond. 1/

The failure of counsel to respond to a disputed issue on a potentially

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1/ On January 12, 1987, plaintiffs filed an opposition memorandum without first seeking permission to file such a late memorandum. This ruling had already been drafted. Nevertheless, the court has considered plaintiffs' arguments and holds that they do not alter the substance of this ruling. Counsel is reminded, however, that Local Rule 31 grants the court authority to assess costs against counsel who obstructs the "effective and efficient administration of the court's business." Plaintiffs' counsel's conduct has come dangerously close to warranting such sanctions.

dispositive motion places the court in an awkward position. The court is no longer able merely to serve the function of decision-maker; instead, it is forced to act as an advocate and anticipate the arguments that might have been made on behalf of a party. This duel role serves neither the interest of the court --whose resources are already significantly taxed -- nor the client -- whose claims are only fully known by his attorney. Indeed, this is the justification for Local Rule 9(a), which provides that "(f)ailure to submit a memorandum in opposition to a motion may be deemed sufficient cause to grant the motion, except where the pleadings provide sufficient grounds to deny the motion." Nevertheless, the court has considered the record and the relevant legal principles.

In Narumanchi v. Board of Trustees, Civil No. H-86-51, this court considered a similar action and held that summary judgment would enter for defendants in view of the exhaustive procedural safeguards provided plaintiff by the Collective Bargaining Agreement in order to ensure that he was not deprived of his constitutional rights without due nprocess of law. Ruling on Motion for Summary Judgment or in the Alternative For Dismissal at 6-9. Those same procedures are equally applicable to plaintiffs' claims herein and equally satisfy due process. Cleveland Board of Educ. v. Loudermill, 105 S. Ct. 1487, 1495-96 (1985); Winston v. United States Post Office, 585 F.2d 198 (7th Cir. 1978). Plaintiffs' arguments that this process is called into question by virtue of defendants' failure to reschedule the hearing at a time convenient for them,

the committee's considerations of issues outside the notice of issues provided plaintiffs and, generally, that the grievance procedure is overbroad is baseless. By their own admissions, plaintiffs were able to appeal any procedural discrepancies involved with the hearing according to the procedures outlined in the Collective Bargaining Agreement. Plaintiffs' allegations, unsupported by facts, Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986), simply do not call into question the propriety of the grievance procedure. Even if plaintiffs were found to have cognizable constitutional interests, the state has provided them with an effective means by which they can present their grievances. Levitt v. University of Texas, 759 F.2d 1224, 1228 (5th Cir. 1985); Simmons v. UConn, Civil No. H-86-62 (D. Conn. 1986), Ruling on Motion to

Dismiss or in the Alternative for Summary Judgment at 12-17. "Of all fields, which the federal courts should hesitate to invade and take over, education ... at a university level ... (is) probably the least suited for federal court supervision." Faro v. New York University, 502 F.2d 1229, 1231-32 (2d Cir. 1974). The due process clause of the Fourteenth Amendment does not ensure against incorrect or ill-advised personnel decisions. Bishop v. Wood, 426 U.S. 341, 349-50 (1976). This court will not allow itself to play the role of a referee; it has "neither the competency nor the resources to undertake" such an academic endeavor. Clark v. Whiting, 607 F.2d 634, 640 (4th Cir. 1979). Having failed to produce any facts whatsoever to substantiate their claims that the university procedure is unconstitutional, summary judgment is appropriate. Celotex,

106 S.Ct. at 2552-53.

As to plaintiffs' suspected claims of 42 U.S.C. Sections 1985, 1986 violations, dismissal is appropriate.2/ Plaintiffs' allegations are wholly conclusory and completely devoid of any factual substantiation. Narumanchi Ruling at 9.

Having so held, it is unnecessary to discuss defendants' remaining arguments. This case is hereby dismissed.

SO ORDERED.

Dated at Hartford, Connecticut, this 28th day of January, 1987.

Peter C. Dorsey

United States District Judge

2/ Although plaintiffs generally allege a conspiracy and violation of the equal protection of the laws, they fail to cite the relevant statute.

APPENDIX E

ORDER OF THE UNITED STATES

DISTRICT COURT

(Filed December 16, 1986)

Civil Action No. H-86-302 PCD

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI

Plaintiffs

V.

THE BOARD OF TRUSTEES OF THE CONNECTICUT

STATE UNIVERSITIES, et al.

Defendants

December 16, 1986.

Motion is granted but subject to the condition that plaintiffs will not in relation hereto be permitted any further discovery.

Peter C. Dorsey

U.S.D.J.

APPENDIX F

RULING OF THE UNITED STATES

DISTRICT COURT

DISTRICT OF CONNECTICUT

(Filed October 6, 1986)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL ACTION NO. H-86-51 (PCD)

RADHA R.M. NARUMANCHI

Plaintiff

V.

THE BOARD OF TRUSTEES OF THE CONNECTICUT

STATE UNIVERSITY, et al.

Defendants.

RULING ON DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Background

This is an action under 42 U.S.C. Sections 1983, 1985, 1986 and 2000e, et seq., pertaining to disciplinary action exercised and threatened against plaintiff in relation to his employment as a tenured professor at Southern Connecticut State University. Defendants have moved to dismiss or in the alternative for summary judgment. Fed. R. Civ. P. 12(b)(6) and 56. Defendants' motion is granted in part and denied in part.

Facts

Plaintiff is an Asian Indian citizen of the United States and is a tenured professor at Southern Connecticut State University. Mr. Narumanchi claims that

in the performance of his duties he was deprived of his rights under the First, Fifth and Fourteenth Amendments of the United States Constitution in contravention of 42 U.S.C. Sections 1983, 1985 and 1986 by the defendants acting individually and in a conspiracy with one another. Specifically, plaintiff asserts that, among other things, he has received both written and oral reprimands, has been evaluated on a basis by which others of like race are not so evaluated and in a manner which is not authorized by the employment contract between plaintiff and Southern Connecticut University, has received notice of suspension without pay, has had his reputation discredited and has been interfered with in the performance and specific obligations of his employment.

Counts two and three of plaintiff's

amended complaint 1/ allege violations of 42 U.S.C. Sections 2000e, et seq., -- unlawful discrimination in relation to his employment. These two claims were brought before the Commission on Human Rights, which advised plaintiff of his right to bring a civil action.

Plaintiff requests injunctive relief to preclude repetition of unlawful acts and to modify the allegedly discriminatory practice and actual damages of $100,000, punitive damages of $100,000, costs and attorney fees.

Discussion

A motion for summary judgment is granted only when there is "no genuine issue as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); EEOC v. Home Ins. Co., 672 F.2d 252, 256

1/ All references in this opinion are to the amended complaint of June 25, 1986.

(2d Cir. 1982). "The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute." American Int'l Group v. London American Int'l Corp., 664 F.2d 348, 351 (2d Cir. 1981), quoting Heyman v. Commerce & Indust. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). Once the moving party has met that burden, the opposing party is obliged to demonstrate the existence of issues of fact of a material and substantial nature, "not fanciful, frivolous, gauzy, specious, irrelevant gossamer inferences ... nor (mere) suspicisions." 6 J. Moore, Moore's Federal Practice, # 56.15 (3) at 56-486 to 487 (2d ed. 1983); SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978).

Defendants have also moved to dismiss under Fed. R. Civ. P. 12(b)(6). A motion to dismiss is proper when, on

the face of the complaint, there are no facts which, if proven, would entitle plaintiff to relief. 2A J. Moore, Moore's Federal Practice, # 12.08 at 2271-74 (2d ed. 1948 and Supp. 1984-85); Paoloni v. Channel Home Centers, 668 F.2d 721 (3d Cir. 1981).

I. Count One

A. Compliance with Rule 8

Defendants first contend that plaintiff fails to plead facts sufficient to support "the alleged deprivation of constitutional rights." Fed. R. Civ. P. 8.

While it is important to weed out groundless complaints, see generally Dewey v. University of New Hampshire, 694 F.2d 1 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983); Albany Welfare Rights Organization Day Care Center, Inc. V. Schreck, 463 F.2d 620, 623 (2d Cir. 1972); Powell v. Workmen's

Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964), a court should not lightly do so "under the Civil Rights Act .. unless it appears "to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.'" Holmes v. New York City Housing Auth., 398 F.2d 262, 265 (2d Cir. 1986).

Plaintiff's complaint, thought not a model, does properly state a claim. Fed. R. Civ. P. 8(a)(2) and 2A J. Moore, Moore's Federal Practice, # 8.13 at 8-103 (2d ed. 1948 and Supp. 1984-85). It is unlike the complaint dismissed in Dewey, which merely assereted plaintiff's dismissal from his teaching position because of maverick views. Dewey, 694 F.2d at 3-4. Defendants' motion to dismiss, based on Fed. R.Civ. P.8, is denied.

B. Due Process Claim

Plaintiff alleges violations of 42 U.S.C. sections 1983, 1985 and 1986 based on the deprivation of his first and fourteenth amended rights. Complaint at 7, 21 and 24. 2/ Defendants contend that a grievance procedure established in the contract between the Connecticut State University American Association of University Professors and the Board of Trustees of Connecticut State University ("Agreement"), by which plaintiff's employment is controlled, is sufficient to satisfy the due process requirement of the fourteenth amendment.

2/ Paragraph 21 of plaintiff's complaint asserts a right under 42 U.S.C. Sec. 1988. Section 1988 provides attorney fees for those whose civil rights are infringed, it does not set forth a cause of action. In light of ##7 and 24 and plaintiff's memorandum of law, plaintiff appears to have referred to Sec. 1988 when he meant to refer to Sec. 1986.

1. Fourteenth Amendment and 42 U.S.C. Sec. 1983

The protection afforded by the due process clause of the fourteenth amendment applied to both "liberty" and "property" interests. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972). "(W)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process is required. Roth, 408 U.S. at 573, quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). An identical claim is made in # 26 of the complaint, thus sufficiently pleading deprivation of a liberty interest.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure

certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577. A tenured professor has a property interest in continued employment. Accord Cleveland Bd. of Educ. v. Loudermill, 105 S.Ct. 1487, 1495 (1985). Plaintiff alleges a threatened suspension, sufficient to constitute deprivation of a property interest.

The process due plaintiff requires consideration of the "private interest at stake, the risk that the procedure used (would) lead to erroneous results and the probable value of the suggested procedure safeguards and the governmental interest affected." Little v. Streater, 452 U.S. 1, 13 (1981); Matthews v. Eldridge, 424 U.S. 319, 335 (1976). The essential requirements of due process are notice and an opportunity to be heard. See Cleveland

Bd. of Educ., 105 S.Ct. at 1495; Roth, 408 U.S. at 570; Bell v. Burson, 402 U.S. 535, 542 (1971). A "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Cleveland Bd. of Educ., 105 S.Ct. at 1495.

Defendants argue that these requirements are met by the grievance procedure provided by the Agreement. Article III of the Agreement permits employees alleging racial discrimination to file a claim with the Non-Discrimination Committee -- a body created by the university senate and composed of an equal number of bargaining unit members and management. If the committee does not sustain the allegation of discrimination, then the employee may pursue only state and

federal grievance procedures and an Article XIV procedure would not be available. See Agreement, Article III.

Articles XIV and XV of the Agreement deal with non-discrimination grievances such as reprimands, suspensions and terminations. The procedures contained in these two articles are almost identical to those considered by the Seventh Circuit Court of Appeals in Winston v. United States Post Office, 585 F.2d 198 (7th Cir. 1978), and found to meet due process requirements. The procedures in Winston and in issue here provide the right to file grievances informally with supervisors, to institute formal procedures in the event informal procedures fail, to investigation of their claims, to be represented by counsel, to appeal their claims through successive levels of review and to request arbitration if

satisfaction was not otherwise achieved. See also Cleveland Bd. of Educ., 105 S. Ct. at 1495-96 (the grievance procedure provided by the Ohio statute for tenured employees, which provided notice, an opportunity to be heard and an explanation of the emplpoyer's evidence, provided sufficient due process); Baden v. Koch, Nos. 84-7844, 84-7846, slip op. at 116, 209 (2d Cir. Aug. 21, 1986) (the grievance procedure afforded after plaintiff's dismissal as Chief Medical Examiner of the City of New York was adequate in light of the interests affected).

Nevertheless, plaintiff claims that the procedure in issue is defective in that (1) "the EEO Affirmative Action Officer of the Southern Connecticut State University campus never responded to his request for "the Article III Non-Discrimination Committee; and (2) that,

since a number of the individual defendants are responsible for making determinations on grievances at various stages of the procedure, their decisions may not be impartial, thus rendering the procedure unconstitutional. Plaintiff's First Memorandum of Law at 10. An otherwise adequate grievance procedure may be rendered inadequate by a partial decision-maker or some other procedural defect. See Goldberg v. Kelly, 397 U.S. 254 (1970) (partial decision-maker); Cain v. Commonwealth of Virginia, 574 F. Supp. 559 (W.D. Va. 1983) (partial decision-maker); Dobosz v. DelMonte, 509 F. Supp. 964 (D. Conn. 1981)(partial decision-maker).

The complaint is nonetheless deficient for two reasons. First, it is clear that, incident to his employment, a grievance/arbitration procedure exists and obliges plaintiff and his employer.

Secondly, the grievance/arbitration procedure does not, on its face, appear to be deficient as it might meet the requirements of due process. To permit the plaintiff to proceed on the present complaint would, in these respects, fail to give effect to the procedures and the contract which established it and further give credence to the conclusory and presumptive allegations. Put one way, plaintiff is premature in his claims. Put another, plaintiff may not vitiate a contract to which he is a party nor may be avoid the rederess that might correct, in the proceedings provided by the contract, the failures he anticipates, should they occur. For example, he claims that no meeting of the Non-Discrimination Committee has been called, but makes no showing that he has exhausted the means by which that might be accomplished. Prejudice is not

established because plaintiff has sued one who might be called on to act in the procedure. To hold otherwise without a showing of prejudice and a refusal to excluse one's self or to provide a replacement would permit plaintiff to emasculate the procedure by including all of the persons in the hearing process as defendants in a suit such as this, based solely on anticipatory allegations. Accordingly, on the present record, defendants' motion for summary judgment as to the adequacy of the grievance procedure to provide plaintiff with due process is granted.

2. Fourteenth Amendment and 42 U.S.C. Sections 1985 and 1986

A fundamental element of a Sec. 1985 action, and its derivative, Sec. 1986, is proof of a conspiracy to deprive plaintiff of equal protection. Plaintiff's allegations in this respect

are conclusory at best. When the conspiracy occurred, how it occurred, its scope and/or its particular results are not alleged. See Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963) (dismissing complaint for failure to allege adequately or show in affidavit a conspiracy or discriminatory treatment); Mark v. W.R. Grace Co., 578 F. Supp. 626 (N.D. Ga. 1983) (dismissal for failure to show conspiracy); Dubray v. Rosebud Housing Auth., 565 F. Supp. 462 (C.D.S.D. 1983) (dismissal for failure to show conspirary). Defendants' motion to dismiss with regard to the Secs. 1985 and 1986 claims is granted.

3. Fifth Amendment

Plaintiff properly concedes that he has not been deprived of his rights afforded by the fifth amendment. Accordingly, this claim is dismissed.

4. First Amendment

Plaintiff alleges that defendants' conduct, in part, was in response to his exerecise of his right to free speech contrary to the first amendment. Complaint, # 17. Defendants argue that his speech was not a matter of public concern and was not, therefore, protected in the employment context.

In suits involving disciplinary action against public employees for the alleged exercise of their first amendment rights, the speech relied on must have been of a nature to be constitutionally protected. Connick v. Meyers, 461 U.S. 138, 145-46 (1983); Pickering v. Board of Educ., 391 U.S.563, 571-72 (1968). This question depends on: (1) whether the speech is a matter of public concern, Knapp v. Whitaker, 757 F.2d 827, 839 (1985); Connick, 461 U.S. at 145-46; and (2) a balancing of "the interest of the teacher, as a citizen, in commenting upon

matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568; Knapp, 757 F.2d at 838. If the speech is constitutionally protected, plaintiff must then prove that his speech was a substantial or motivating factor in his employer's decision to discipline him. Mt. Healthy City Bd. of Educ. v. Doyle, 4239 U.S. 274, 287 (1977); Knapp, 757 F.2d at 843.

Plaintiff contends that he has been disciplined in response to two statements: (1) his opposition to the School of Business Economics; and (2) the renewal of the employment of Martha F. O'Hara as a professor at the university. Complaint at # 17. "Whether an employee's speech addresses a matter of public concern must be determined by the

content, form and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48. This is a question of law, not fact. Id. at 148, n.7. The case law suggests a finding that plaintiff's speech is one of public concern. Criticism of the allocation of school funds between atheletics and education has been held to be a matter of public concern. Pickering, 391 U.S. at 571-72. In Yoggerst v. Hedges, 739 F.2d 293 (7th Cir. 1984), negative comments by a state employee on the fact that her happiness over the fact that her agency director had been discharged from office were held not protected, since they merely involved the employee's personal feelings about the director. The court noted, however, that its decision would be different if the speech concerned the ability of the director to handle his responsibilities

or that he had in some way violated a public trust. Yoggerst, 739 F.2d at 296. In light of Pickering and Yoggerst, the reorganization of the School of Business Economics and the credentials of Martha F. O'Hara are matters of public concern in that both issues raise questions involving the allocation of state funds, the efficient use of those funds and the receipt of public funds by one who may be vested with a public trust.

The next consideration is the importance of the speech balanced against the interest of the state in promoting "efficiency and integrity in the discharge of official duties and (in) maintain(ing) proper discipline in the public service." Connick, 461 U.S. at 151-52; Mt. Healthy, 429 U.S. at 284. The Seventh Circuit Court of Appeals, when it considered the remarks of a high school teacher, noted that the initial

and often determinative question is whether the speech "interfered with the employee's work or with the efficient and successful operation of the office." Knapp, 757 F.2d at 842. While, per defendants' memorandum, plaintiff's comments have not been received warmly, there is nothing to suggest that operation of the university has been compromised. On balance, therefore, plaintiff's claim of first amendment speech survives the first prong of the Connick test. As to whether the speech was a substantial or motivating factor in the decision of defendants to discipline plaintiff, Mt. Healthy, 429 U.S. at 287, plaintiff sufficiently alleges that the action against him was in response to the speech. Plaintiff has sufficiently pleaded a first amendment claim. However, as was discussed in part B(1) hereof, plaintiff's claims are premature.

Plaintiff has failed to present any facts which would prove that the seemingly proper grievance procedure is inadequate as applied, according to due process standards.

Plaintiff's claim of deprivation of his right to freedom of association is dismissed. Plaintiff's complaint alleges that his right of association has been impeded without sufficient facts pleaded to warrant the conclusion. See Koch v. Yunick, 533 F.2d 80, 85 (2d Cir. 1976) ("Complaints relying on the civil right statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions.").

C. Eleventh Amendment Innumity

Defendants' third major contention is that plaintiff's first count must be dismissed as to the Board of Trustees of

Connecticut State University and the individual defendants acting in their official capacities because swuch parties are protected by the immunity afforded by the eleventh amendment. Defendants' First Memorandum of Law at 2, ## 2 and 4.

The eleventh amendment precludes suit in federal court to impose either legal or equitable liability on an unconsenting state. Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

1. Board of Trustees

The immunity afforded defendant Board of Trustees turns on whether that agency should be treated "as an arm or alter ego of the state, or whether it should be treated instead as a political subdivision of the state." Hall v. Medical College of Ohio, 742 F.2d 299, 301 (6th Cir. 1984); Mt. Healthy, 429 U.S. at 280. Institutions which are an

arm/alter ego of the state are immune under the eleventh amendment; political subdivisions are not. Hall, 742 F.2d at 301, Compare Hart v. University of Texas, 474 F. Supp. 465 (S.D. Tex. 1979), with Whitner v. Davis, 410 F. 2d 24 (9th Cir. 1969); Miller v. Parson, 313 F. Supp. 1150 (M.D. Pa. 1970).

A variety of factors have been used in assessing an agency's status as a "state arm" or a political subdivision: "To what extent does the institution, although carrying out a state mission, function with substantial autonomy from the state government, and ... to what extent is it financed independently of the state treasury?" Hall, 742 F.2d at 302. The defendant Board of Trustees is a creature of statute. Significant control is retained by the legislative and executive branches of government over the Board. See Conn. Gen. Stat. Secs. 10a-87 to

10a-99 (1986). Moreover, the Connecticut Supreme Court has ruled that a counterpart of the present defendant, the Board of Trustees for Eastern Connecticut State College, was a public agency cloaked with sovereign immunity. Rogan v. Board of Trustees, 178 Conn. 579, 582-84 (1979). While the Board of Trustees has significant control and discretion over state education matters, their autonomy is limited. Stolberg v. Caldwell, 175 Conn. 586, 602-03 (1978).

The Board of Trustees, which is the defendant here, not its individual members who are not named either in their official or individual capacities, see Pavlak v. Duffy, 48 F.R.D. 396 (D. Conn. 1969), is a political arm of the state and as such is immune from suit. Defendants' motion lfor summary judgment as to the Board of Trustees is granted.

2. Individual Defendants Acting

in Their Official Capacities

Next is the question whether eleventh amendment immunity extends to the individual defendants in their official capacities. A suit by a private party seeking disbursements from a state treasury is barred by the eleventh amendment. A suit seeking prospective relief from a state official is not so barred, Ex parte Young, 209 U.S. 123 (1908); Edelman v. Jordan, 415 U.S. 651 (1974), even though such equitable relief may have an ancillary effect on the state treasury. Quern v. Jordan, 443 U.S. 332, 337, citing Milliken v. Bradley, 433 U.S. 267 (1977)).

Defendants' motion for summary judgment or dismissal of plaintiff's first count for prospective relief against the individual defendants' actions in their official capacities is denied. Plaintiff's claim for monetary

damages from the individual defendants in their official capacities is dismissed.

3. Individual Defendants Acting in Their Personal Capacities

Defendants claim that they are shielded from personal liability by good faith immunity. The complaint sufficiently alleges facts which, if true, would cast doubt on defendants' good faith. Defendants' motion to dismiss cannot be sustained on this basis.

> The doctrine of qualified or good faith immunity shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Wilson v. Attaway, 757 F.2d 1227 (11th

Cir.). reh'g denied, 764 F.2d 1141 (11th Cir. 1985). The crucial element in determining whether an official is immune hinges on whether or not a defendant violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Davis v. Scherer, 468 U.S. 183, 191 (1984), citing Harlow v. Fitzgerald, 457 U.S. 800 (1982). The test is purely objective. Davis, 468 U.S. at 193. Plaintiff alleges that many of his courses have been eliminated; he has received oral and written reprimands; he has been suspended without pay; and he has been disciplined for exercise of his free speech. Plaintiff also claims defendants interfered with the grievance procedure established by the Agreement. These allegations preclude a finding, as a matter of law, that defendants necessarily acted in good faith.

Although federal courts should be slow to become involved in the state's internal administrative procedures and should not second guess the discretionary judgment of education officials in the operation of a school, Clark v. Whiting, 607 F.2d 634, 640 (4th Cir. 1979), it cannot close its eyes to complaints of discrimination by state officials merely because such officials are running a school. Accord Aumiller v. University of Delaware, 434 F. Supp. 1273, 1292-93 (1977). Moreover, civil rights complaints should not lightly be dismissed. Escalera v. New York City Housing Auth., 425 F.2d 853 (2d Cir. 1970). "Dismissal of civil rights complaints are scrutinized with particular care; ... (dismissal is not proper) unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would

entitle him to relief." Wilson v. Winstead, 470 F. Supp. 263, 266 (E.D. Tenn. 1978). Plaintiff has sufficiently alleged facts which call into question the availability of a good faith immunity defense to defendants. Defendants' motion on this point is denied.

D. Pending State Litigation

Defendants' claim that the institution of a similar but not identical suit in the state court bars this action has no merit. Plaintiff may bring such similar suits. Collateral estoppel and res judicata may be invoked when one of these actions comes to final judgment.

E. Remaining Defenses

Defendants remaining two defenses to plaintiff's first count -- (1) that an action for retaliation may not be maintained under 42 U.S.C., Sec. 1983; and (2) that plaintiff does not have a clear right to injunctive relief -- are

denied.

"(T)he underlying purpose of (the) legislative scheme (of 42 U.S.C. Sec.1981, et seq., is) to permit victims of constitutional violations to obtain redress..." United States v. City of Philadelphia, 644 F.2d 187, 188 (3rd Cir. 1980); accord Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977). An action for retaliation may properly provide that redress and thus may be brought under Sec. 1983. Absent such a right, retaliation may chill - if not effectively thwart any meaningful measure of relief under the law. Plaintiff also has asserted facts which, if true, would sustain a remedy for injunctive relief. See Allee v. Medraro, 416 U.S. 802 (1974) (where workers feared retaliation in the event their exercise of their constitutional rights, injunctive relief could be awarded).

II. Counts Two and Three

On April 9 and May 16, 1986, plaintiff was given permission by the State Commission on Human Rights and Opportunities ("CHRO") to take legal action with regard to the claims he had filed before that commission. Narumanchi v. Board of Trustees, No. 8540474 (filed June 24, 1985); Narumanchi v. Board of Trustees, No. 8640137 (filed October 24, 1985). The substance of those complaints are at issue in this case. Counts two and three raise Title VII allegations.

A. Simultaneous 42 U.S.C. Sec. 1983 and 42 U.S.C. Sec.2000e-5 claims

Defendants argue that plaintiff may not assert a Title VII, 42 U.S.C. Sec. 2000e-5, claim based on the same facts on which his Sec.1983 action is premised. A Title VII action does not preclude a simultaneous Sec. 1983 action where the plaintiff asserts rights separate from

those afforded by Title VII, i.e. the exercise of free speech. Trigg v. Wayne Schools, 766 F.2d 299, 301 (2d Cir. 1985); Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1205 (6th Cir. 1984).

B. Improper Parties

Defendants also argue that, with regard to count two, the Board of Trustees and defendants Adanti, Leader and O'Hara are improper parties and, as to Count three, all defendants, including Anisman, are improper. Title 42 U.S.C. Sec. 2000e-5(f)(1) states, in relevant part, that "a civil action may be brought against the respondent named in the charge ... by the person claiming to be aggrieved." Defendants argue that because plaintiff labeled his claim to the CHRO (the charge) as against: "Board of Trustees/State University, Southern Ct. State University," plaintiff did not

name the Board as an entity and cannot now sue it. The Board cannot claim that it was not put on notice of the CHRO charges. See Kaplan v. International Alliance of Theatrical, etc. 525 F.2d 1354 (9th Cir. 1975) (sufficient that EEOC be apprised generally of the alleged discriminating parties).

The same conclusion must be reached with regard to defendant Anisman in regards to count two, since he was specifically mentioned in the CHRO complaint of June 24, 1985. However, such reasoning cannot be applied to defendants Adanti, Leader and O'Hara as to counts two and three, and defendant Anisman as to count three. The general rule that defendant must have been named as a respondent in the CHRO hearing

before he can become named as a defendant in the subsequent court action is a product of the two-fold purposes behind 42 U.S.C. Sec. 2000e-5(f)(1) "that the charge serves to notify the charged party of the alleged violation; and (2) that notice brings the party before the (EEO) making possible effectuation of the Act's primary goal of securing voluntary compliance with its mandates." Eggleston v. Chicago Journeymen, 657 F.2d 890, 905 (7th Cir.), cert. denied, 455 U.S. 1017 (1981). Nevertheless, the general rule has been riddled with exceptions. See Brewster v. Schockley, 554 F. Supp. 365, 368 (W.D. Va. 1983) (exception where "named defendant and unnamed defendant are substantially identical or are, in essence, in an agency relationship"); id. at 368, citing Bratton v. Bethlehem Steel Corp., 649 F.2d 658 (9th Cir.

1980) (exception where "named and unnamed defendants are engaged in a common discriminatory scheme and the plaintiff has alleged charges sufficient to put (the EEO) on notice that the unnamed defendant also violated Title VII"); Eggleston, 657 F.2d at 905 (exception where unnamed party has adequate notice of the charge and was given an opportunity to participate in the conciliation procedures).

In Garcia v. Gardner's Nurseries, Inc., 585 F.Supp. 369 (D. Conn. 1984), a plaintiff cited, in his agency complaint, plaintiff's supervisor. The court reasoned that, though there are many exceptions to the general rule, where the identity of all the defendants was known to the plaintiff at the time of the EEOC hearing, it was not proper to name, as a defendant in the civil action, one who was not named in the

complaint to the agency.

Here, defendants Leader, O'Hara, Anisman and Adanti were known to plaintiff at the time of his two CHRO filings, yet only Anisman was named and only in the first CHRO filing. There is no genuine issue of material fact as to the failure of plaintiff to meet the condition precedent of naming defendants Leader, Adanti and O'Hara with respect to counts two and three and Anisman with respect to count three in the previous CHRO filings. These defendants' motions for summary judgment are granted as to count three and, for all but Anisman, as to count two.

C. Improper Allegations

Plaintiff allegedly has added two new claims in his court action that he did not assert in his two CHRO hearings:

(a) additional claims of discrimination based on race,

color and ancestry; and

(b) claims in count two, # 38(e), and count three, # 38(e), (that) defendants have not permitted the Department Evaluation Committee, of which the plaintiff is a member, to exclusively evaluate or assess all department faculty including the plaintiff.

This court recognizes that the case law on this subject is by no means consistent, but it chooses to follow the more remedial rule announced in Hicks v. ABT Ass'n, 572 F.2d 960, 966 (3d Cir. 1980) (where plaintiff was allowed to allege a sex discrimination complaint in addition to her EEOC alleged race discrimination complaint since a court should be able to consider charges that fell within the parameters of the EEOC investigation), rather than the limiting

rule announced in Shah v. Zion Hosp. & Medical Center, 642 F.2d 268, 271 (9th Cir. 1981) (where plaintiff alleged only national origin and sex discrimination in the EEOC complaint, plaintiff could not enlarge his federal court complaint to include allegations of race, color and religious discrimination).

As plaintiff properly notes, the CHRO would properly have been able to review, as closely related, the facts which might have suggested discrimination based on race and color as well as the relationship of plaintiff to the Department Evaluation Committee and how the alleged discrimination of defendants affected that relationship. Thus, defendants' motion with regard to this issue is denied.

D. Compensatory and Punitive Damages

Defendants' final point with regard to counts two and three is that plaintiff

has no right to compensatory or punitive damages under 42 U.S.C. Sec. 2000e-5(g). This statute only authorizes equitable remedies; compensatory and punitive damages are precluded by the statute. Patzer v. Board of Regents, 763 F.2d 851 (7th Cir. 2985); Shah, 642, 642 F.2d at 272; Davidson v. Yeshiva University, 555 F. Supp. 75 (S.D.N.Y. 1982). While plaintiff is correct in assereting that compensatory and punitive damages are available under a Sec. 1983 action, Smith v. Wade, 461 U.S. 30, 51 (1983), such is not the case under Title VII. Thus, so much of plaintiff's complaint alleging the avilability of compensatory and punitive damages under Title VII is dismissed.

Conclusion

A. Count One

(1) Defendants' motion for summary

judgment with regard to plaintiff's claims of violation of the fourteenth amendment and 42 U.S.C. Sec. 1983 is granted.

(2) Defendants' motion to dismiss all claims under 42 U.S.C. Secs. 1985 and 1986 is granted.

(3) Plaintiff's claim under the fifth amendment is dismissed.

(4) Defendants' motion to dismiss with regard to plaintiff's claims of violation of the first amendment right to freedom of speech is granted. The plaintiff's claim of deprivation of freedom of association is dismissed with prejudice.

(5) Defendants' motion for summary judgment with respect to defendant Board of Trustees is granted.

(6) Defendants' motion is denied to the extent it seeks dismissal of plaintiff's prospective relief against

the individual defendants acting in their official capacities; but plaintiff's claim for monetary damages against these defendants in their official capacities is dismissed.

(7) Defendants' motion is denied as to the individual defendants acting in their personal capacities.

B. Counts Two and Three

(1) Defendants' motion is denied to the extent it seeks dismissal of the Board of Trustees and summary judgment as to the allegedly improper allegations. It is granted with respect to defendants Leader, O'Hara and Adanti as to Counts Two and Three and defendant Anisman as to Count Three.

(2) Defendants' motion for dismissal of the compensatory and punitive damage claims under 42 U.S.C. Sec. 2000e-5(g) is granted. It is denied with respect to the Sec. 1983 claim.

C. All remaining arguments of defendants are denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 2nd day of October, 1986.

Peter C. Dorsey

United States District Judge

APPENDIX G

AMENDED COMPLAINT DATED

NOVEMBER 20, 1986 OF PLAINTIFFS

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL ACTION NO. N-86-302 (PCD)

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI

Plaintiffs,

V.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTON, KERRY GRANT, BARBARA BARD, MICHAEL K. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES

Defendants

November 20, 1986

AMENDED COMPLAINT

Plaintiffs allege:

FIRST COUNT:

I

Plaintiff, Mohan L. Mehta, is an Asian Indian citizen of the United States presently residing at 195 Summit Street in the City of Bridgeport, County of Fairfield and State of Connecticut. The plaintiff is and at all times mentioned herein, has been, a tenured professor at Southern Connecticut State University (hereinafter referred to as S.C.S.U.).

II

The plaintiff, Radha R. M. Narumanchi, is an Asian Indian citizen of the United States presently residing at 657 Middletown Avenue in the City of New Haven, County of New Haven and State of Connecticut. The plaintiff is and at all times mentioned herein, has been, a

tenured professor at S.C.S.U.

III

The defendant, Board of Trustees of the Connecticut State Universities (hereinafter referred to as the Board of Trustees), governs the State colleges, including S.C.S.U., in accordance with Section 10a-87 and 10a-20 of the Connecticut General Statutes and its predecessor sections.

IV

Defendants, Barbara Bard, Jerry Basnnister, Michael K. Becker, Doris Griscom, Frank E. Muska, and Michael E. Pernal (hereinafter referred to as members of the Academic Freedom Committee) under color of State Law in pretense of the Statutes, Ordinances, Regulations, Customs, and usages of the State of Connecticut and by virtue of and under the authority of their offices as members of the Academic Freedom Committee

of the defendant, Board of Trustees.

V

Defendants David C. Newton and Kerry E. Grant, are agents and employees of the defendant, Board of Trustees, who at all times referred to herein acted as co-convenors of the Academic Freedom Committee (hereinafter referred to as co-convenors) under color of State Law in pretense of the Statutes, Ordinances, Regulations, Customs, and usages of the State of Connecticut and by virtue of and under the authority of their offices as co-convenors of the Academic Freedom Committee for the defendant, Board of Trustees.

VI

Defendants Alan H. Leader and Michael Adanti are agents and employees of the defendant, Board of Trustees, who acted under color of State Law in pretense of Statutes, Ordinances, Regulations,

Customs, and usages of the State of Connecticut and by virtue of and under the authority of their offices as Dean of the School of Business Economics and President at S.C.S.U. for the defendant, Board of Trustees.

VII

This action arises under the provisions of the First and Fourteenth Amendments to the United States Constitution and under the laws of the United States, particularly under Title 28 of the United States Code Sections 2201 and 2203 and under Title 42 of the United States Code Section 1983.

This court has jurisdiction of this cause under Title 28, United States Code Section 1343.

VIII

The defendants, acting individually and in concert, and under color of State Law and of the Customs, Practices and

Usages of the State of Connecticut, are responsible for depriving the plaintiffs of their rights, priviledges and immunities secured to them by the Constitution and laws of the United States particularly their rights to Freedom of Speech guaranteed under the First Amendment of the Constitution, to equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution, and their rights not to be deprived of property or liberty without due process of law guaranteed by the Fourteenth Amendment to the Constitution. This action therefore is brought against the defendants individually and in their official capacities.

IX

During the time the plaintiffs have been employed by the defendant Board of Trustees the defendants acting individually and in concert and under color of

State Law have discriminated against the plaintiffs with respect to the terms, conditionss and privileges of their employment because of the plaintiffs' race, color and national origin in violation of Title 42 of the United States Code Section 1983.

X

This proceeding seeks a judgment declaring that the order of the above named defendants consisting of the Academic Freedom Committee instructing the administration of S.C.S.U. to devise alternative evaluation committies at the department and university level, whenever not doing so would place the plaintiffs in a position to evaluate or have any authority over Professors Wafeek Abdelsayed, Richard Fahringer and Martha O'Hara (hereinafter referred to as complainant professors), further instructing the administration of

S.C.S.U. to remove all evaluations and alledged pejorative statements made by the plaintiffs concerning the complainant professors to be expunged from their personnel record and further, ordering the plaintiffs to cease and desist in their alleged attempts to restrict the academic freedom of the complainant professors, contravenes the constitutional provisions cited. This proceeding also seeks a temporary restraining order, preliminary and permanent injunction to prevent the deprivation of certain of those rights, privileges and immunities secured to the plaintiffs by the Constitution of the United States for the purpose of enjoining the defendant members of the Academic Freedom Committee from continuing to order the administration of S.C.S.U. to devise alternative evaluation committies at the department and university level, whenever not doing

so would place the plaintiffs in a position to evaluate or have any authority over the complainant professors, further ordering the administration of S.C.S.U. to expunge from the personnel files of the complainant professors any and all evaluations and alleged pejorative statements about the complainant professors made by the plaintiffs and directing the plaintiffs to cease and desist in their alleged attempts to restrict the academic freedom of the complainant professors. This proceeding also seeks damages from the defendant members of the Academic Freedom Committee in their individual capacities.

XI

This proceeding further seeks a judgment declaring that the disciplinary warning issued to the plaintiffs from the defendant Alan H. Leader instructing the plaintiffs to remove themselves at the

department and university level from any further matters which place them in a position to evaluate or have any authority over the complainant professors and to cease and desist in their alleged attempts to restrict the academic freedom of such complainant professors contravenes the constitutional provisions cited. This proceeding also seeks a temporary restraining order, preliminary and permanent injunctions to prevent the deprivation of certain of those rights, privileges and immunities secured to the plaintiffs by the constitution of the United States for the purpose of enjoining the defendant Alan H. Leader from continuing to order the plaintiffs to remove themselves from any departmental and university level matters which place them in a position to evaluate or have any authority over the complainant professors and further orders the

plaintiffs to cease and desist in their alleged attempts to restrict the academic freedom of the complainant professors. This proceeding also seeks damages from the defendant Alan H. Leader resulting from such restrictions and disciplinary warning.

XII

The proceeding seeks a judgment declaring that the two week suspension issued by the defendants Alan H. Leader and Michael Adanti concerning the plaintiff Mohan Mehta contravenes the constitutional provisions cited. This proceeding also seeks a temporary restraning order, preliminary and permanent injunction to prevent the deprivation of certain of those rights, privileges and immunities secured to the plaintiff, Mohan Mehta, by the constitution of the United States for the purpose of enjoining the defendants, Alan

H. Leader and Michael Adanti from continuing to impose upon such plaintiff's period of suspension or otherwise disciplining the plaintiff. This proceeding also seeks damages resulting from such suspension.

XIII

This proceeding further seeks a judgment declaring that the notice to impose discipline issued by the defendant Alan H. Leader to the plaintiff, Radha R.M. Narumanchi, contravenes the constitutional provisions cited. This proceeding also seeks damages resulting from such notice of discipline.

XIV

This proceeding further seeks a judgment declaring that the refusal of the defendant co-convenors of the Academic Freedom Committee, David C. Newton and Kerry E. Grant, to reschedule the Academic Freedom Committee

hearing concerning the plaintiffs contravenes the constitutional provisions cited. This proceeding further seeks damages from defendants, David C. Newton and Kerry E. Grant, acting in their individual capacity resulting from such refusal to reschedule such hearing.

XV

The plaintiffs pursuant to the rules, regulations and policies of the defendant Board of Trustees were member of the Department Evaluation Committee (hereinafter referred to as D.E.C.) and had the right and privilege pursuant to such membership of evaluating for promotion, tenure and renewal faculty within the Department of Accounting and Finance or the Department of Accounting. At all relevant times mentioned herein, Professors Wafeek Abdelsayed, Richard Fahringer, and Martha O'Hara were faculty within the Department of Accounting or

the Department of Accounting and Finance subject to evaluation by the plaintiffs as members of D.E.C.

XVI

On or about April 26, 1985, Professors Wafeek Abdelsayed, Richard Fahringer, and Martha O'Hara filed a formal complaint with the Academic Freedom Committee of the defendant Board of Trustees alleging that the plaintiffs had violated their Academic Freedom as established under the Collective Bargaining Agreement between the Connecticut State University American Assocaition of University Professors and the Board of Trustees for the Connecticut State University. Such complaint consisted of three sections: Section 1, paragraph A through M, Section 2, paragraph A and Section 3, paragraphs A through E.

XVII

On or around February of 1986,

Mr. Richard L. Judd, Presiding Officer for the Academic Freedom Committee notified the plaintiff that a hearing would be scheduled for March 3, 1986 regarding the Academic Freedom complaint filed against them by Professors Abdel-sayed, Fahringer and O'Hara. Defendant David C. Newton informed the plaintiffs that such hearing was to be restricted to paragraphs D, E and F on page 2 of the complaint and paragraph 2A on page 8 of the complaint.

XVIII

On or about February 27, 1986, the plaintiffs were notified that the hearing scheduled for March 3, 1986 regarding the Academic Freedom complaint filed against them was cancelled because of scheduling conflicts. The plaintiffs were requested to send their schedule including Saturdays so that a new hearing could be scheduled.

XIX

On or about April 11, 1986 the defendant co-convenors of the Academic Freedom Committee notified the plaintiffs that a new hearing had been scheduled for May 16, 1986 for the purpose of hearing the Academic Freedom Complaints filed against them.

XX

On or about April 28, 1986 plaintiff, Mohan Mehta, notified the convenors of the Academic Freedom Committee in writing that he would be out of the country on May 16, 1986 and would not be available to attend the hearing. Professor Mehta requested that the hearing be rescheduled. Professor Mehta had received approval from S.C.S.U. to be out of the country on said date.

XXI

The plaintiff Professor Narumanchi notified the co-covenors that he would be

unavailable to attend the May 16, 1986 hearing due to a final exam which was previously scheduled which he was required to administer.

XXII

The defendant co-covenors of the Academic Freedom Committee refused to grant plaintiffs' request to reschedule the hearing from May 16, 1986. In so refusing to reschedule such hearing the defendant co-covenors abused their discretion and violated the plaintiffs' due process rights guaranteed under the Fourteenth Amendment of the Constitution and Title 42 Section 1983.

XXIII

On or about May 16, 1986 the members of the Academic Freedom Committee conducted a hearing to determine the validity of the complaint against the plaintiffs. Plaintiffs were unable to attend such hearing and no evidence was

heard in opposition to the complaint filed against them.

XXIV

At such hearing on or about May 16, 1986 the members of the Academic Freedom Committee heard testimony from Professors Abdelsayed, Fahringer and O'Hara concerning their complaint of April 26, 1985 without restricting such testimony to paragraphs D, E and F on page 3 and paragraph 2A on page 8 of their complaint. Instead, the members of the Academic Freedom Committee heard testimony regarding numerous of the other paragraphs in the complaint and issues not previously mentioned in such complaint despite the fact that no notice or opportunity to be heard regarding these latter paragraphs and issues was given to the plaintiffs.

XXV

On or about May 16, 1986 the defendant

members of the Academic Freedom Committee issued the following order regarding the complaint filed against the plaintiffs:

> The administration of Southern Connecticut State University shall divise alternative evaluation committees at the departmental and university level whenever not doing so would place any of the respondents in the position to evaluate or have any authority over any of the complainants.
>
> All evaluations of and all perjurative statements about the complainants made by the respondents contained in the personal files of the complainants shall be expunged from the records by the administration of Southern Connecticut State University.
>
> Professors Buck, Mehta and Narumanchi are directed to cease and desist in their attempts to restrict the academic freedom of Professors Abdelsayed, Fahringer and O'Hara.

XXVI

The defendant members of the Academic Freedom Committee based such order upon findings which were not restricted to paragraphs D, E and F on page 3 and paragraph 2A on page 8 of the complaint

but was instead based upon findings regarding numerous other issues of which the plaintiffs had no notice or opportunity to be heard.

XXVII

On or about July 24, 1986 the defendant Alan Leader issued a disciplinary warning to the plaintiffs notifying them of the decision and order of the member of the Academic Freedom Committee and directed the plaintiffs to remove themselves from any matters which would put them in a position to evaluate or have authority over the complainants. Defendant Leader further directed the plaintiffs to cease and desist in their alleged attempts to restrict the academic freedom of the complainants.

XXVIII

Subsequently the defendant Alan Leader notified plaintiff Mohan Mehta that he would be suspended for two weeks for his

alleged violation of the academic freedom of the complainant professors.

XXIX

The defendant Alan Leader also recommended that the plaintiff, Radha Narumanchi be further disciplined for his alleged violation of the academic freedom of the complainant professors. Such recommendation was accepted by the administration of Southern Connecticut State University. The nature of the discipline has not been disclosed to the plaintiff Radha Narumanchi.

XXX

Thereafter in accordance with the Collective Bargaining Agreement between the Connecticut State University American Association of University Professors and the defendant Board of Trustees for the Connecticut State University, the plaintiffs individually filed grievances concerning the failure of the defendant

co-convenors to provide the plaintiffs with an opportunity to be heard at the Academic Freedom Committee hearing by rescheduling such hearing, the failure of the defendant members of the Academic Freedom Committee to provide notice to the plaintiff that the hearing would not be restricted to those issues raised in paragraphs D, E and F on page 2 and paragraph 2A on page 8 of the complaint, the disciplinary warning issued by the defendant Alan Leader ordering the plaintiffs to remove themselves from any matters which might place them in a position to evaluate or have any authority over the complainant professors and further ordering the plaintiffs to cease and desist their alleged attempts to restrict the academic freedom of the complainant professors, and the notice of intent to further discipline by suspending the plaintiff Mohan Mehta and taking

other disciplinary action against the plaintiff Radha Narumanchi. The plaintiffs grieved such actions taken by the defendants upon the basis that these actions violated their rights as guaranteed under the Fourteenth and First Amendments to the Constitution and Title 42 Section 1983.

XXXI

Thereafter a grievance hearing was held at the third step of the grievance procedure, however the plaintiffs were not provided with an opportunity to address the merits of the findings, decision and order of the defendant Academic Freedom Committee members but rather were restricted to a presentation regarding procedural defects of the scheduling of such hearing and the conduct of the hearing.

XXXII

The plaintiffs have not been given an

opportunity to respond to the merits of the allegations made against them by the complainant professors before the defendant members of the Academic Freedom Committee or before any members of the administration of Southern Connecticut State University.

XXXIII

The grievance filed by the plaintiffs was denied and the plaintiffs have exhaused their remedies under the Collective Bargaining Agreement between the Connecticut State University American Association of University Professors and the Board of Trustees for the Connecticut State University.

XXXIV

The above referenced actions of the defendants violated the plaintiffs' property rights to continued employment without the implementation of discipline and the right to seek promotional

positions which would place them in a position of authority over the complainant professors without due process of law in violation of the rights secured to the plaintiffs by the Fourteenth Amendment of the Constitution and Title 42 Section 1983.

XXXV

The above referenced actions of the defendants violated the plaintiffs' contractual property rights to evaluate the complainant professors as members of the Departmental Evaluation Committee without due process of law in violation of the rights secured to the plaintiffs by the Fourteenth Amendment of the Constitution and Title 42 Section 1983.

XXXVI

The above referenced actions violated the plaintiffs' liberty rights without due process of law by damaging their reputation among their peers, students

and the community for integrity, professionalism and respect for the rights of others in violation of the rights secured to the plaintiffs by the Fourteenth Amendment of the Constitution and Title 42 Section 1983.

SECOND COUNT:

I Through XXXVI

Paragraph I through XXXVI of the First Count are incorporated herein by reference as if fully pleaded.

XXXVII

The continuing acts, policies, practices, customs and usages of the defendants described and complained of herein are unlawful employment practices in that they have the effect of discriminating against, depriving, intending to deprive the plaintiffs of their rights to equal protection of the law because of their race, color, and national origin in violation of the Fourteenth Amendment of

the Constitution and Title 42 of the United States Code, Section 1983.

XXXVIII

Defendant co-convenors reschedule Academic Freedom Committee hearings as a matter of course for professors not of the same race, color and national origin as the plaintiffs. The defendants' failure to reschedule such Academic Freedom Committee hearing violated the plaintiffs' right to equal protection under the law under the Fourteenth Amendment of the Constitution and Title 42 United States Code Section 1983.

XXXIX

The defendant co-convenors notify professors not of the plaintiffs' same race, color and national origin as a matter of course of all issues regarding alleged violations of academic freedom filed against them prior to an Academic Freedom Committee hearing regarding such

complaints. The failure by such defendants to so notify the plaintiffs of all such issues prior to the May 16, 1986 hearing violated the plaintiffs' rights to equal protection under the Fourteenth Amendment of the Constitution and Title 42 United States Code, Section 1983.

XL

The defendant members of the Academic Freedom Committee based their decision that plaintiffs had violated the academic freedom of the complainant professors upon findings including numerous issues plaintiffs had been informed would be restricted from such consideration. Such defendants have not followed this practice for professors not of plaintiffs' same race, color and national origin. Such actions by the defendant members of the Academic Freedom Committee violated the plaintiffs' rights of equal protection of the laws under the

Fourteenth Amendment of the Constitution and Title 42 Section 1983.

XLI

The defendants, Alan Leader and Michael Adanti have not imposed disciplinary action beyond that recommended by the Academic Freedom Committee against professors not of the plaintiffs' same race, color and national origin. The actions by such defendants in which they imposed disciplinary warnings and actions against the plaintiffs violated the plaintiffs' rights to equal protection under the Fourteenth Amendment of the Constitution of the United States and Title 42, United States Code, Section 1983.

XLII

The herein-referenced actions were taken by the defendants in their individual and official capacities with reckless or callous indifference to such

federally-protected rights of the plaintiffs.

THIRD COUNT:

I Through XLII

Paragraphs I through XLII of the Second Count are incorporated herein by reference as if fully pleaded.

XLIII

Section 4.2.1 of the Collective Bargaining Agreement between the Connecticut State University American Association of University Professors and the Board of Trustees for the Connecticut State University provides in pertinent part that with respect to Academic Freedom:

> Members participate as representatives of a learned profession, of an educational institution and of society at large. When they speak or write as members of society, they are free from institutional censorship or discipline, but their special position in the community imposes special obligation. As persons of learning and educational leaders, they should remember that

> the public may judge their profession and their institution by their utterances. Hence, they should exercise appropriate restraint, show respect for the opinions of others, and make every effort, where appropriate, to indicate that they do not speak for the Connecticut State University.

XLIV

The defendant members of the Academic Freedom Committee found that the plaintiffs had violated the academic freedom of the complainant professors including that section of the Collective Bargaining Agreement referenced above.

XLV

Such defendant members of the Academic Freedom Committee based their decision that the plaintiffs had violated the academic freedom of the complainnt professors upon, among other things, the following findings:

> Upon an allegation made by Professor Fahringer that the plaintiff Radha R.M. Narumanchi told him how to vote on a proposed departmental re-organization; that

the plaintiff, Radha R.M. Narumanchi, accused Professor O'Hara of not being a C.P.A. and demanded that she be terminated for falsification of her credentials; that Professor Narumanchi informed the Georgia Board of Accountancy of Professor O'Hara's falsification of her credentials; that the plaintiff Professor Narumanchi's charges against Professor O'Hara have appeared widely in Connecticut newspapers; and that the plaintiffs have both pressured Professors Abdelsayed and O'Hara to support a particular candidate for the position of president of S.C.S.U.

XLVI

The determination of the defendant members of the Academic Freedom Committee that the above referenced findings constituted the violation of the academic freedom of the complainant professors violated the plaintiff's right to freedom of speech guaranteed by the First Amendment of the Constitution and Title 42 of the United States Code Section 1983.

XLVII

The actions of defendant Alan H.

Leader and Michael Adanti in issuing disciplinary warnings and notices of intents to discipline, and notices of suspension to the plaintiffs based upon the above referenced findings of the Academic Freedom Committee violated the plaintiffs' rights to freedom of speech guaranteed by the First Amendment of the Constitution and Title 42 of the United States Code Section 1983.

XLVIII

The plaintiffs have filed a grivance under the Collective Bargaining Agreement between the Connecticut State University American Association of University Professors and the Board of Trustees for the Connecticut State University regarding such violations of their First Amendment right of freedom of speech and have been issued a decision with respect to such grievance which is final and binding under the terms of such Collec-

tive Bargaining Agreement denying such grievance.

XLIX

Section 4.2.1 of the Collective Bargaining Agreement between the Connecticut State University American Association of University Professors and the Board of Trustees for the Connecticut State University referred to above upon which the defendant members of the Academic Freedom Committee determined that the plaintiffs had violated the academic freedom of the complainant professors is overly broad and vague and the implementation by such defendants of this section violates the plaintiffs' rights to freedom of speech guaranteed under the First Amendment of the United States Constitution and Title 42 of the United States Code Section 1983.

XL

The plaintiffs have no plain,

adequate, or complete remedy at law to redress the wrongs alleged, and this suit for injunctive relief is their only means of securing adequate relief. The plaintiffs have suffered and will continue to suffer extreme hardship and actual and impending irreparable injury and/or loss and/or damage in that the action taken by the defendants will result in the loss of esteem and respect of the plaintiffs' students and colleagues for the plaintiffs and, thereby, will damage their relationships with their students and colleagues. Such action will damage the plaintiffs' repuations in the community, and the impending suspension of which the plaintiff, Mohan L. Mehta, has been notified will deprive the plaintiff of a property and liberty right without due process of law.

WHEREFORE, the plaintiffs pray that this court advance this case on the docket, order a speedy hearing at the earliest possible date, cause this case to be in every way expedited, and on such hearing to this Court that it:

1) Issue a temporary restraining order and a preliminary injunction ordering the defendants, their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them to refrain immediately and pending the final hearing on the determination of this action, from engaging in each of the unlawful practices, policies, customs, and usages set forth herein and particularly from further disciplining the plaintiffs; and from continuing and and all practices shown to be in violation of the applicable laws;

2) Issue a permanent injunction perpetually enjoining and restraining the

defendants, their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them from engaging in each of the unlawful practices, policies, customs, and usages set forth herein and from continuing any and all practices shown to be in violation of the applicable laws;

3) Order a modification or elimination of practices, policies, customs, and usages set forth herein and all other such practices shown to be in violation of applicable laws so that they do not discriminate on the basis of race, color, or national origin against the plaintiffs;

4) Award the plaintiffs actual damages and punitive damages against each individual defendant named herein;

5) Award the plaintiffs herein the costs and disbursements of this action, including reasonable attorney fees, under

the Civil Rights Statutes of the United States Code; and

6) Award the plaintiffs such other and further relief as this Court may deem proper.

Dated November 20, 1986.

THE PLAINTIFFS,
MOHAN L. MEHTA & RADHA R.M. NARUMANCHI
By
Christine M. Ellis, their attorney of Altschuler, May & Stanek, P.C., 12 Bank Street, Seymour, CT 06483
Juris #101092: Phone 888-4144

STATE OF CONNECTICUT)
) ss: Seymour
COUNTY OF NEW HAVEN)

I, RADHA R.M. NARUMANCHI, the plaintiff in the above-entitled matter, being first duly sworn, state that I have read and subscribed to the foregoing

complaint, and the facts set forth therein are true and accurate.

RADHA R.M. NARUMANCHI

Subscribed and sworn to before me on the 12th day of November, 1986.

Commissioner of the Superior Court
Christine M. Ellis

STATE OF CONNECTICUT)
) ss: Seymour
COUNTY OF NEW HAVEN)

I, MOHAN L. MEHTA, the plaintiff in the above-entitled matter, being first duly sworn, state that I have read and subscribed to the foregoing complaint, and the facts set forth therein are true and accurate.

MOHAN L. MEHTA

Subscribed and sworn to before me on the 12th day of November, 1986.

Commissioner of the Superior Court
Christine M. Ellis

APPENDIX H

COMPLAINT TO ACADEMIC FREEDOM PANEL

DATED APRIL 26, 1985

April 26, 1985

To: Professor Nathan Lerner
Dean Lynne Welch

From: Professor Wafeek Abdelsayed
Professor Richard Fahringer
Professor Martha O'Hara
Department of Accounting and Finance, SBE

Pursuant to article 4.2.3.2 of the Collective Bargaining Contract we wish to file with you a formal complaint about repeated and continuing violations of our academic freedom within the Department of Accounting and Finance, SBE. These violations have been committed by the three tenured faculty members of the department and have been so

pervasive and persistent that they constitute a clear pattern of denial of our rights as faculty members of SCSU. We believe they reflect a deliberate attempt by the tenured members of the department to curtail our academic freedom, and to keep us in a position of virtual servitude within the department, because we will not accede to their personal and political wishes. It would not be unfair to characterize their treatment of us as a "reign of terror" that has not only denied us any meaningful voice in the functioning of the department, but has also created an atmosphere of such intimidation and discomfort that our effective functioning as productive SCSU faculty members has been virtually precluded. In a wider sense, the personal and political ambitions responsible for these violations have paralyzed the entire school of

Business Economics, and to a certain extent, the operation of the University as a whole.

We have waited until now to file formal charges in the hope that the problems within our department could be addressed amicably and/or that administrative action could lead to their resolution. Recent events, however, have made it clear that such hope is misguided, and that the problems are becoming even more serious, and our position even more intolerable.

We can provide you with documentation of this consistent pattern of violations of our academic freedom continuing now for one of us for more than year. The following are specific instances of violations categorized as: 1) personal harassment, 2) interference with our academic freedom to conduct our course, and 3) denial of our attempts to parti-

cipate in departmental decision-making. While these categories are not completely independent of one another, they are useful designations to illustrate the scope and severity of the violations.

1. Personal Harassment, Debasement and Intimidation

We have repeatedly been harassed in a wide variety of ways, some of them bordering on the libelous. The complainants have been subjected to repeated attacks on their personal and professional integrity. This demeaning of us has gone far beyond mere academic differences, or even personal dislike, to a point that can only be called systematic intimidation of us. This appears to be an attempt by tenured faculty to gain support for their personal schemes for the department, or to punish us for our unwillingness to give them our unqualified support.

A. In his April 3, 1985 memo to Chairperson Buck, Professor Fahringer went on record as objecting to a number of occurrences at the April 3, 1985 Accounting faculty meeting called to rectify the errors and omissions of the Fall 1985 schedule. The points he raised about this particularly outrageous meeting are all long-standing examples of how we have been harassed, and each will be further detailed in later sections in this account. "(1) Professor Narumanchi's demonstrated deepseated discrimination against American accounting systems and organizations with his remarks that the Certificate of Management Accounting and the National Association of Accountants are 'nonsense' certificates and entities". Professor Narumanchi thus impunged the competence of colleagues.

"(2) Professor Narumanchi's sexual harassment shown by his lack of respect to the female member of our faculty with the use of obscenities at our faculty meeting (and your lack of action when he used such language) and his repeating the obscenity to me when I requested an apology in her presence for his crass behavior to her and to all the scholars present."

"(3) Professor Narumanchi's violation of the academic freedom of his fellow academicians with his constant threat of suing Southern Connecticut State University employees who differ with him, as evidenced by the numerous suits that he presently has pending or has recently had pending."

"(4).....An additional act of intellectual dishonesty was performed by Professor Narumanchi and permitted by you when Professor Narumanchi informed

the group at the commencement of the meeting that a Dean 'had no business in' the Fall schedule under consideration'. He said he would not allow anyone to touch the advanced courses he was teaching. This last can be interpreted as a reproval of those untenured members who tried to enlist the aid of the acting Dean in resolving the discriminatory scheduling of classes."

B. The objections of the complainants to the attacks on their personal and professional integrity, and the denial to them of collegial participation as members of the department were overridden at this April 3, 1985 meeting, and their objections were not even recorded in the minutes of the meeting despite their insistence that the records show the matters of concern to them.

C. Professor Fahringer has been attacked verbally by Professor Narumanchi in the most unprofessional manner on a number of occasions.

Professor Narumanchi, in a conversation with Professor Abdelsayed before the latter was even hired as an SCSU faculty member, called Professor Fahringer a "Judas".

He has publicly called Professor Fahringer "incompetent" on a number of occasions, and in his evaluation of him used words such as "confused", and "ignorant".

D. Professor Narumanchi has tape recorded faculty meetings, creating a very intimidating atmosphere. Professor Fahringer has observed instances in which selective parts of the tapes appear to have erased.

Another aspect of the climate of intimidation created by Professor

Narumanchi is seen in the statements he sent threatening anyone who voted for his recall from the Faculty Senate with legal consequences. (See the December 14, 1984 letter by Professor Narumanchi referring to "Continued violation of established procedures by some members of the School", and his accompanying statement on "Liability of joint tortfeasors".)

Still another example of this type of intimidation, in the Spring of 1984 Professor Narumanchi instructed Professor Fahringer to go to then President Harrison's office to be told how to vote on the SBE reorganization plan.

E. Our teaching schedules have been arranged so that students who want to learn from us do not have the opportunity to take our courses. Also, next semester's teaching schedules have

been "rigged" to stifle both faculty and student dissent. In other words, our teaching schedules are being altered for political and intimidation purposes.

F. Chairperson Buck has refused to remedy the retaliatory measures taken against Professor Fahringer by Professor Narumanchi for the former's refusal to support the latter's political and departmental ambitions. Professor Narumanchi arbitrarily forced Professor Fahringer to change his teaching schedule, and refused to let him select courses out of those Professor Fahringer had been listed to teach.

In Professor Fahringer's April 9, 1985 letter to Acting Dean Anisman, "Don Buck has never come to my defense and has repeatedly demostrated a lack of concern over the academic well-being

of myself and that of my fellow new faculty members in the accounting field. Instead, he and Professor Narumanchi have brought pressure on me not to communicate to you my very real problems in attempting to cope with the discrimination to which I have been subjected."

G. In a February 7, 1985 letter to Chairperson Buck, Professor Narumanchi referred to, "Falsification of credentials by Professor Martha Freeman O'Hara", "As usual, Ms. O'Hara tries to mislead the administration by saying she did not violate the AICPA's Code of Professional Ethics", "Even as late as January 30, 1985, when Ms. O'Hara had appeared before the DEC she tried to hoodwink the Committee by making untrue statements....", "Ms. O'Hara has no effective response to all such

fraudulent behavior and falsification of her credentials....", etc.

The slanderous and completely unprofessional nature of these charges were investigated by Acting Dean Anisman who determined that at most there had been only a minor techinical violation of CPA licensure, and he highly recommended her for renewal.

In an April 8, 1985 memo to Acting Dean Anisman, Professor Buck again questioned the validity of the CPA credentials of Professor O'Hara, and stated again that he had recommended "the non-renewal of Associate Professor O'Hara on the basis of her not possessing a valid CPA license at the time of her first year annual review that last February 1985."

Acting Dean Anisman's April 11, 1985 response to Professor Buck reprimanded him for writing the April 8 memo,

after the renewal process was completed, and after the points raised had been "investigated in the proper manner. To raise such an issue again over an item which is to be contained in an Accreditation Report to the Board of Governors is inappropriate and highly improper". "The renewal process for this year is at an end. I hope I do not have to inform you of this fact again".

H. Professor O'Hara was left out of the Fall 1985-86 schedule of classes. In his February 26, 1985 memo to Chairman Buck, Acting Dean Anisman stated, "As far as I know, Professor O'Hara has not been informed that she will not be a member of the faculty next year. I, therefore, will not send in the schedule until she is listed for a full schedule." "This is just the sort of attitude I was condemning at

yesterday's meeting." "Please see to the matter immediately".

I. One of the senior faculty member apparently gone so far as to penalize an outspoken student (an advisee of one of us) with a grade of F on a make-up exam that reflects her dissent rather than her achievement. This is an unethical direct attack on a student who organized an expression of concern over Professor Narumanchi's power within the SBE (see the March 27, 1985 article in Southern News). It is also an indirect attack on our freedom to teach and counsel students within our discipline in that it is an attempt to discourage students from dealing with anyone who disagrees with the senior faculty of the department.

In her March 27, 1985 letter to Professor O'Hara, this student claimed

unfair time limits for the make-up test, and that Professor Mehta had not graded it 4 weeks after the test was taken. As of now she has not received a final grade 7 weeks after taking the make-up final.

J. Discriminatory practices with respect to the cancelling of classes.

In his April 10, 1985 memo to Acting Dean Anisman, Professor Fahringer points out another example of the continuous discrimination against him practiced by Professor Narumanchi. "On October 11, 1984, in his evaluation report on me to the DEC committee, he falsely accused me of malingering in order to leave campus early on Friday October 5th. This resulted in my not being in class during the hours of 2 to 4 PM for his unscheduled observations." Professor Fahringer then went on to explain that

he had not faked an illness, but rather had told his two Friday afternoon classes several weeks earlier that these two sessions would not be held out of respect for the Jewish students who could not attend and still be home by sundown to observe their Yom Kippur holiday. "Even after he discovered that I had not in fact pretended an illness to avoid my duties, he referred the matter to the chairperson for discipline pointing out that I was in violation of the faculty contract. His final recommendation in my case was that my employment contract not be renewed. The chairperson required me to apply the 1/2 day as a personal day". Professor Fahringer, in his memo, went on to contrast this with the case of 3/4 day absence by Professor Mehta who cancelled one

class by phone, and failed to appear for a second class despite an exam scheduled for this class. Professor Mehta did appear on campus later that day to attend a late afternoon department meeting. In his first class, students asked Professor Fahringer the whereabouts of Professor Mehta, after waiting 20 minutes Professor Fahringer stated, "When I asked them what was the topic to be covered, they replied they had no syllabus. When I asked them how they were doing in the course, they replied they had not received midterm grades". There was no response of Chairperson Buck or Professor Narumanchi to the notification of Professor Mehta's absence from his classes. Professor Fahringer stated, "I wish to state that I perceive this to be a clear case of prejudicial

treatment of myself as opposed to that of other faculty members". Professor Fahringer believes that Professor Mehta's absence could have been due to the demands of his extensive private tax pracdtice. Professor Mehta has been observed several times xeroxing tax returns and other client materials on the department's machine.

K. Discriminative enforcement of office hours. Office hour requirements are being selectively enforced, based on whether or not an individual supports the senior faculty. The Chairperson shows favoritism for an untenured faculty member who votes with the tenured faculty, by not enforcing his office hours.

L. Professor Narumanchi's current harassment of Professor Fahringer can be traced to a period before the Department of Accounting and Finance

became a separate department.

In his April 21, 1985 letter to Stuart Solomon, Professor Fahringer described how at a Fall 1983 meeting, Professor Narumanchi engaged in completely unauthorized interference in the operations of a search committee chaired by Professor Fahringer. He harassed Professor Fahringer over the issue of advertising an accounting position. Professor Fahringer's letter must be read to get a picture of the unprofessional actions of Professor Narumanchi, at the October meeting of the faculty, to get Professor Fahringer removed from his post as chair of the search committee. Following that, Professor Narumanchi netered Professor Fahringer's office and threatened him with disciplinary action if Professor Fahringer continued in his efforts to

hold a meeting of the search committee. He continued to shout and threaten Professor Fahringer, and yelled: "I don't like your face". Professor Buck stepped between the two and ushered Professor Narumanchi from Professor Fahringer's office.

M. In their April 23, 1985 memo to Stuart Solomon, Professor O'Hara and Abdelsayed described another instance of harassment of Professor Fahringer by Professors Narumanchi and Mehta. On August 31, 1984 Professor Narumanchi asked Professors Abdelsayed and O'Hara to meet with him and Professor Mehta to decide certain issues prior to the formal departmental meeting to be held on September 5, 1984. At this meeting several derogatory comments were made about the absent Professor Fahringer by Professors Narumanchi and Mehta. They

described Professor Fahringer as lacking interest in and unwilling to participate in departmental activities.

Professors O'Hara and Abdelsayed later learned that Professor Fahringer had not been invited to attend or even informed of the August 31, 1984 meeting. He thus was deliberately denied a voice in some very important departmental decisions.

N. Abuse by the tenured faculty of their positions as peer evaluators, rendering imporper and discriminatory judgements. Since peer evaluation, and the question of renewal are such sensitive and important judgements made about us, discrimination and harassment against us in this area has been particularly intimidating and painful.

1) In their DEC evaluation of Professor Abdelsayed, Professors Mehta and Narumanchi criticized his use of an overhead projector, classroom participation by students, student ratings, and other matters. In his February 8, 1985 letter to President Adanti, Professor Abdelsayed rebutted these criticisms as biased, unprofessional and distorted, although the DEC and Chairperson both recommended his renewal. Acting Dean Anisman, in his February 15, 1985 letter to Vice President Nowlan stated, "I concur with these recommendations but would like to add a more enthusiastic note than either of the other recommendations."

2) The DEC did not recommend the renewal of Professor O'Hara accusing her of a serious violation of professional ethics, in connection

with the CPA license issue previously mentioned, of lack of progress toward a Ph.D., and implying that she has politicized students against the accounting professors from India.

In her February 5, 1985 letter to President Adanti rebutting these charges, Professor O'Hara stated, "The DEC, which is composed of the two tenured accounting faculty, has viciously attacked all three non-tenured members of the accounting faculty through the evaluation process. These iniquitous attacks are signs of the political turmoil within the School of Business and within our Department. They have little, if anything, to do with the merits of the faculty being evaluated.... I appeal to the administration not only to reverse the negative recommendation and renew my contract, but also to

take any action possible to prevent further misuse of our evaluation process by the DEC."

Despite the DEC recommendation for non-renewal, concurred in by Chairman Buck, Acting Dean Anisman highly recommended her for renewal, which was approved.

3) Professor Fahringer was not recommended for renewal by the DEC, and Chairperson Buck's recommendation was mixed but arrived at no final determination.

The classroom observation report on Professor Fahringer by Professor Narumanchi contained the following statements: "Professor Fahringer is a very confused individual." "His theoretical background in Accounting subject is very thin". Further, his report several times refers to Professor Fahringer's "ignorance",

"inability to read", and "the competency of Professor Fahringer to teach Cost Accounting is in serious doubt". Professor Fahringer rebutted these defamatory statements about his competency, and Acting Dean Anisman recommended him for renewal in his October 29, 1984 letter to President Adanti. "I have heard nothing but outstanding comments about Professor Fahringer from students since I have been Acting Dean of this School". "I found this class to be one of the better prepared and presented lectures I have observed in many years of classroom observation". Professor Fahringer has unfortunately been at Southern during a particularly difficult and turbulent period in the School of Business Economics. Inevitably and regrettably, he has become enmeshed in some of the turmoil

of the past few years. Much of this is not of his choosing or desire, and he has remained one of the best teachers in his area in spite of these difficulties".

Again, in spite of the vicious DEC attacks against him, Professor Fahringer was approved for renewal.

In the consideration of these instances of personal harassment, the following statement in the collective bargaining agreement should be borne in mind: p. 6, article 4.1.1.1

> "He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas he shows due respect for the opinions of others. He acknowledges his academic debts and strives to be objective in his professional judgements of colleagues."

We submit that the continued and systematic harassment of us, by tenured department members has made a mockery of the above cited article.

2. Interference With Our Academic Freedom To Conduct Our Courses

A Interfering in the content of our courses, and the way we present our material.

Previous of this semester, there were several courses for which we could not select our own texts, or make up our own examinations. In these courses we could only use texts selected by Professors Narumanchi and Mehta, and standard publisher's examinations.

Adherence to departmental standards of course content and examinations, duly voted upon by the entire department, is not a violation of academic freedom. However, nowhere in the departmental by-laws is there any reference to arbitrary restrictions on texts and examinations. Rather, the department by-laws, (and the collective bargaining contract) state

(Article 4.11),

> "All members when teaching shall have professional freedom to conduct their courses, provided that the subject matter is that which has been specified by the deparment and the university".

We submit that the restrictions on our texts and examinations violate our academic freedom, and the above specific provision of the departmental by-laws, and the collective bargaining agreement, and as such are grievable, under article 14 of the collective bargaining agreement.

3. <u>Denial Of Our Attempts To Participate Meaningfully In The Functioning And Decision Making Of The Department</u>

A In his April 21, 1985 letter to Stuart Solomon, Professor Fahringer asserted that shortly after the creation of a separate Department of Accounting and Finance, Professor Narumanchi became chair of a new search committee made

up of Professor Fahringer and Mehta. The meetings of this search committee were scheduled at the last minute, usually on Professor Fahringer's non-teaching days. His views were usually ignored. Final decisions were made during the summer, and although Professor Fahringer was not teaching summer school he volunteered to return to the campus to take part in the final decisions. Although he was assured that he would be notified of meetings, he never was, and so the final decisions about hiring were made without his participation.

Refer also to the failure to inform Professor Fahringer of the August 31, 1984 meeting, described in 1 M above.

B The untenured members were left off the search committee for new faculty members.

In his March 15, 1985 memo to Chairperson Buck, Acting Dean Anisman stated, "I strongly urge that the make-up of the Search Committee for positions in Accounting and Finance be re-thought. If the structure of the committee is not changed, I would have no choice but to turn to other sources of information in order to make an informed decision".

C In that same March 15, 1985 memo to Chairperson Buck, Acting Dean Anisman stated, "I would also like the concept of the Accounting Coordinator reconsidered. This is not a reflection on the present incumbent of that position, but on the way it has operated. Until I am convinced that this person is selected with the approval of the majority of faculty in Accounting, I will no longer acknowledge such a position. Please make this a high

priority".

D The unfair and discriminatory scheduling of classes, referred to previously, has not only been used to personally harass us, but is also a prime example of our inability to participate in the decision-making of the department.

Professor Mehta, in conjunction with Professor Narumanchi, schedules the courses to be taught, and the times and days when they will be held with no input from the other Accounting faculty about which courses are to be offered and their scheduling.

It is their policy to let part-timers teach 8:00 AM courses, while not giving full-timers access to them. Professor Buck, in his April 4, 1985 letter to Acting Dean Anisman, stated that, "Approximately 55% of our courses are still being taught by

part-timers, and special efforts must be made to keep desirable slots opon so as to attract the most qualified adjunct professors". This policy is not stated in the department by-laws, nor was it a specifically voted upon policy by the department. It is another example of policy unilaterally imposed by the tenured members. Nothing in the CSU Agreement for Part Time Employees in the Instructional Faculty Bargaining Unit either requires or recommends that part-time employees be given preference over full-time employees in scheduling of classes.

In his March 15, 1985 letter to Chairperson Buck, Acting Dean Anisman referred to the inequitable distribution of courses, and lack of input of untenured members into their assignment. "As a follow-up to this, I am

not satisfied with the listing of advanced courses in Accounting for the Fall semester of 1985. Accordingly, I have changed the faculty names on the following courses to 'staff'.... I will not change these 'staff' listings until I am satisfied that all full-time faculty in accounting have gotten together and agreed on an equitable distribution of advanced courses. Please make this a top priority".

The April 1, 1985 memo of Acting Dean Anisman to Professor Buck continued to express his dissatisfaction about the assignment of faculty to advanced accounting courses in the fall. "I am not satisfied by your reply. Let me repeat that I do not consider the assignment of courses either fair or equitable. Two of the full-time faculty are totally excluded from these courses and the majority of the

full-time faculty feel they have had no real say in the offering and/or staffing of these courses".

"Once again, I am asking you as Chairman to call all the full-time Accounting faculty together to agree on a schedule that is reasonably satisfactory to all concerned. If you fail to do this, I would have no choice but to make a final decision on these courses".

Professor Buck's April 4, 1985 memo to Acting Dean Anisman asserted that fair teaching schedules were assigned, based on

> "Seniority on Southern's faculty
> Time in a particular rank
> Experience and the number of times a faculty member has taught a particular course"

Department Chairperson Buck has thus refused to respond to requests by untenured faculty to offer advanced courses, and a breaking of the control

of these courses by the tenured faculty. The criteria he states for scheduling are not based on departmentally voted-upon by-laws, as they are found nowhere in the by-laws. Rather they are unilaterally imposed by the tenured faculty as a way of exerting exclusive control over the courses, and the opportunity of the untenured faculty to teach them.

E In his February 4, 1985 letter to Professors Buck and Narumanchi, Acting Dean Anisman criticized their exclusion of full-time untenured accounting faculty members from the process of inviting area businessmen to our campus.

> "It is both shortsighted and counterproductive to exclude any full-time faculty members of the department from such an event....I cannot understand nor accept any rationale that attempts to justify this procedure".

Request for Redress of These Violations of Our Academic Freedom

We have asked for representation by CSU-AAUP in these matters. We, and our representative, Stuart Solomon, stand ready to meet with you at any time and/or to supply you with whatever additional information you require to resolve these continuing problems.

The redress that we are requesting for these violations of our academic freedom are:

1. a statement of agreement, by the final arbiter of our claim, that our academic freedom has been violated by 2 the tenured members of our department.

2. a directive to the offending faculty members that they cease their violation of our rights.

3. a directive preventing Professors Narumanchi, Buck and Mehta from occupying any position (DEC, or University Promo-

tion and Tenure Committee) in which they can make evaluative judgements about us.

4. a directive that current biased DEC evaluations be removed from our files, and that new DEC evaluations be made.

We seek only to be able to function as responsible and participating members of our department and academic community, whose rights to differ professionally with colleagues is respected and who are judged on their abilities rather than on their submissiveness.

Wafeek Abdelsayed

Richard Fahringer

Martha O'Hara

APPENDIX I

MEMORANDUM OF DECISION

JANUARY 13, 1986

THE CONNECTICUT STATE UNIVERSITY

ACADEMIC FREEDOM PANEL

MEMORANDUM OF DECISION

RE: Complaints of Professors Wafeek Abdelsayed, Richard Fahringer and Martha O'Hara, Southern Connecticut State University

EMPANELMENT

The Panel convened on 18 November and in accordance with its guidelines reviewed Professors Abdelsayed, Fahringer and O'Hara's appeal filed on April 26, 1985. The Panel at this juncture is obliged to consider the written allegations and "(a) find the issue is not one of academic freedom and dismiss the case; or (b) find the allegations may involve academic freedom issues and proceed to an oral

presentation by the parties, or solicitation of written briefs by the parties; or (c) seek further information by formal or informal means."

PANEL MEMBERS

Professor Barbara Bard, CCSU

Dean Richard L. Judd, CCSU and Presiding Officer

Professor Doris Griscom, ECSU

Vice President Michael Pernal, ECSU

Professor Jerry Bannister, WCSU

Dean Frank Muska, WCSU

COMPLAINT

The complaints of Professors Abdelsayed, et.al., under the date of 26 April 1985 are acknowledged and incorporated by reference as part of this memorandum of decision.

DECISION

Complaint A

(1) (page 2) The Panel finds no violation of academic freedom and is

dismisses the complaint. There is no showing of an effect of the events outlined in this section involving academic freedom and in the section related to the departmental evaluation committee, no relationship is drawn. The Panel notes that if problems alluded to herein exist, such are contractual matters and subject to grievance procedures.

(2) This matter is not within the purvue of the Panel. Complaint dismissed.

(3) Represents an opinion of the complainants and not determined to be a matter of academic freedom. Complaint dismissed.

(4) Complaint deals with a matter of departmental prerogative and as such are within the scope of departmental authority. Mechanisms for redress in such matters are contractual in nature and not

within the purvue of the Panel.
Complaint dismissed.

Complaint B

The complaint alleges violations of the by-laws of the Faculty Senate that guide the activities of departments in this area and as such is not within the purvue of the Panel; the collective bargaining agreement provides for remedies in instances of alleged matters of this nature. Complaint dismissed.

Complaint C

The allegations contained in this complaint should be addressed with the appropriate supervisor and/or by the institution of a civil action and are therefore determined not be within the purvue of the Panel. Complaint dismissed.

Complaints D, E, and F (page 3)

Treated jointly by the Panel. There exists the possibility that violations of

academic freedom have occured in these instances and that a possible pattern of harassment exists. Complaint E is a matter within the purvue of the academic department concerned. The Panel, will in later sections of this decision, respond to this question.

Complaint G and H

The Panel finds the issues raised not proximate to a violation of academic freedom. Complaints dismissed.

Complaint I

This allegation is hearsay and not appropriately before the Panel. Complaint dismissed.

Complaint J

This complaint is a grievable matter under the contract. Complaint dismissed.

Complaint K

There is no showing of a violation of academic freedom; the complaint moreover is within prerogatives of management.

Complaint dismissed.

Complaint L

The allegation is a matter of opinion and not proximate to a violation of academic freedom. Complaint dismissed.

Complaint M

Remedies are provided for the By-laws of the Faculty Senate and therefore not within the purvue of the Panel.
Complaint dismissed.

Complaint N

(1) The activities of a department evaluation committee are expected to be judgmental in nature and are subject to oversight of the appropriate academic dean. The record submitted indicates that Dean Anisman negated the comments complained about. Complaint dismissed.

(2) and (3) No showing of violation of academic freedom. Complaint dismissed.

Complaint 2 (page 8)

A. The Panel acknowledges possible violations of academic freedom may exist in this instance, however, will postpone determination of same pending receipt of information that will be required below under authority granted the Panel in the Collective Bargaining agreement.

Complaint 3

A. Remedies are provided for by internal processes of faculty governance under the aegis of the faculty and therefore not within the purvue of the Panel. Complaint dismissed.

B. There is no showing of a violatin of academic freedom merely because "untenured members were... left off the search committee..." Indeed, the administration acted to advise the department of concerns in the committee composition. Remedies are provided for by internal processes of faculty

governance under the aegis of the faculty and therefore not within the purvue of the Panel. Complaint dismissed.

C. The Panel finds no issue related to a violation of academic freedom. Complaint dismissed.

D. Scheduling of classes is a contractual matter. If management prevents faculty members from having opportunities to be involved in the matter of scheduling of courses, such remedies for such action may be addressed through the grievance procedure. The dean in the instant matter took appropriate action expressing his dissatisfaction with course assignments of faculty. The Panel sees no effect upon academic freedom. Complaint dismissed.

E. If the facts related to the Panel are valid, an interference with academic freedom is possible. The dean, however, took notice of the problem. The Panel is

not supplied with the effect the dean's action had and therefore requires information from the University as to this aspect before entering a decision.

Panel Requirements

The Panel requires the local panel to supply it with its findings determined in its letter of 28 May 1985. Specifically, the Panel wishes to know the nature of the attempts to informally resolve the instant matters. This is particularly important in Complaints D, E, F and 2-E. The Panel, based upon its review of these data may require further filings of the parties and therefore issues no decision on these parts at this time.

PER ORDER, CONNECTICUT STATE UNIVERSITY
ACADEMIC FREEDOM PANEL

Richard L. Judd, Presiding Officer
Jerry Bannister Barbara Bard
Doris Griscom Frank Muska
Michael Pernal

APPENDIX J

DECISION AND ORDER OF ACADEMIC FREEDOM COMMITTEE, ISSUED MAY 30, 1986

THE CONNECTICUT STATE UNIVERSITY

ACADEMIC FREEDOM COMMITTEE

In the matter of

Professors Wafeek Abdelsayed,

Richard Fahringer, and Martha O'Hara

SOUTHERN CONNECTICUT STATE UNIVERSITY

AND

Professors Donald Buck, Mohan

Mehta, and Murty Narumanchi

SOUTHERN CONNECTICUT STATE UNIVERSITY

Hearing held May 16, 1986

Decision issued May 30, 1986

APPEARANCES;

Dr. Stevart Solomon, for the complainants

Wafeek Abdelsayed, Richard Fahringer

and Martha O'Hara, Pro Se

DECISION AND ORDER

On April 26, 1985, the complainants, professors Abdelsayed, Fahringer and O'Hara, filed a complaint with the Academic Freedom Committee members from Southern Connecticut State University alleging various violations of their academic freedom by the respondents, professors Buck, Mehta and Narumanchi. After the requisite preliminary steps had been taken the matter came to a hearing before the Academic Freedom Committee of The Connecticut State University on November 18, 1985. In a decision dated January 13, 1986, the Committee dismissed all allegations except items 1D, 1E, 1F and 2A of the April 26, 1985 complaint. These four items were set down for full hearing before this committee. All parties were duly notified of the time and place of the hearing and acknowledged receipt of

such notice. On May 16, 1986, the hearing on these matters was convened at the offices of the Board of Trustees for the Connecticut State University in New Britain, Connecticut. The respondents failed to appear.

The complaints considered by the committee were:

1. Professor Narumanchi has tape recorded faculty meetings, creating a very intimidating atmosphere. Professor Fahringer has observed instances in which selective parts of the tapes appear to have been erased.

2. Another aspect of the climate of intimidation created by Professor Narumanchi is seen in the statements he sent threatening anyone who voted for his recall from the Faculty Senate with legal consequences. (See the December 14, 1984 letter by Professor Narumanchi referring to "Continued

violation of established procedures by some members of the school.", and his Liability of joint tortfeasors".)

3. Still another example of this type of intimidation, in the Spring of 1984 Professor Narumanchi instructed Professor Fahringer to go to then President Harrison's office to be told how to vote on the SBE reorganization plan.

4. Our teaching schedules have been arranged so that students who want to learn from us do not have the opportunity to take our courses. Also, next semester's teaching schedules have been "rigged" to stifle both faculty and student dissent. In other words, our teaching schedules are being altered for political and intimidation purposes.

5. Chairperson Buck has refused to remedy the retaliatory measures taken against Professor Fahringer by Professor Narumanchi for the former's refusal to

support the latter's political and departmental ambitions. Professor Narumanchi arbitrarily forced Professor Fahringer to change his teaching schedule, and refused to let him select courses out of those Professor Fahringer had been listed to teach.

6. In Professor Fahringer's April 9, 1985 letter to Acting Dean Anisman, "Don Buck has never come to my defense and has repeatedly demonstrated a lack of concern over the academic well-being of myself and that of my fellow new faculty members in the accounting field. Instead, he and Professor Narumanchi have brought pressure on me not to communicate to you my very real problems in attempting to cope with the discrimination to which I have been subjected."

7. Interfering in the content of our courses, and the way we present our material.

8. Previous to this semester, there were several courses for which we could not select our own texts, or make up our own examinations. In these courses we could only use texts selected by Professors Narumanchi and Mehta, and standard publisher's examinations.

9. Adherence to departmental standards course content and examinations, duly voted upon by the entire department, is not a violation of academic freedom. However, nowhere in the department by-laws is there any reference to arbitrary restrictions on texts and examinations. Rather, the department by-laws, (and the collective bargaining contract) state (Article 4.11), "All members when teaching shall have professional freedom to conduct their courses, provided that the subject matter is that which had been specified by the department and the university."

10. We submit that the restrictions on our texts and examinations violate our academic freedom, and the above specific provision of the departmental by-laws, and the collective bargaining agreement, and as such are grievable, under article 14 of the collective bargaining agreement.

FINDINGS

Having been duly sworn, the Committee, on the whole record before us, make the following findings, conclusins, decision and order.

1. The departmental Evaluation Committee consisted of Professors Narumanchi and Mehta.

2. Professor Narumanchi had no position of authority in the department except as a member of the Departmental Evaluation Committee.

3. Chairperson Buck appointed Professor Mehta as accounting coordinator

without discussin or vote by the department.

4. When Dean Anisman ordered the department to choose for itself who the accounting coordinator should be, Professor Narumanchi recorded in the minutes of a department meeting that such an act was illegal.

5. Procedures for choosing texts and setting examinations were not discussed or voted upon in department meetings.

6. Professor Mehta established the schedules for accounting classes. He reserved most required upper level and single section courses for himself and Professor Narumanchi. For summer school catalogues he listed all courses as staff.

7. In Octobe 1984 Professors Narumanchi and Mehta evaluated Professor Fahringer's performance as unsatisfactory and recommended that his appointment not

be renewed after Professor Fahringer refused to continue to use the Cost Accounting text desired by Professor Narumanchi.

8. Professor Narumanchi conducted a student evaluatin of Professor Fahringer's class, never showing him the results but discussing them in front of Professor O'Hara and other department members.

9. The department secre tary told Professor Fahringer that she had been told by Professor Narumanchi not to give Professor Fahringer book order forms. Only after several years and strong insistence did Professor Fahringer get to order his own texts.

10. In his first semester at Southern Professor Fahringer was told by Mehta that one of his day classes was cancelled for lack of enrollment and given an evening course as a replacement. Later

he discovered that the day course was not cancelled and that Professor Mehta was teaching it. In the next semester Professor Fahringer's name was left off the course listing by Mehta. The semester after that it was put in for seven courses. When Fahringer requested to be allowed to pick which four of the seven he would actually teach, he was denied that right by Narumanchi.

11. When Professor Fahringer requested a Tuesday, Thursday schedule, Professor Narumanchi told Professor Fahringer that Monday, Wednesday, Friday schedules had to be rotated among members of he department. Fahringer later discovered that Professor Narumanchi always had a Tuesday, Thursday schedule.

12. Narumanchi refused to let Professor Fahringer see student evaluations done in his class early in the semester on the grounds that the DEC file

was sealed. These evaluations were later cited in a recommendatin by Narumanchi and Mehta that Fahringer's appointment not be renewed. Still later the student evaluations disappeared without Professor Fahringer ever seeing or being able to challenge them. The same statement about not being able to see student evaluations was made to Professor Abdelsayed. Abdelsayed persisted until he saw the evaluations, however.

13. Professor Fahringer was denied a summer school assignment even though adjunts were assigned courses in the summer of 1984.

14. Professor Narumanchi pressured Professor Fahringer to go to a meeting in President Harrison's office by pulling his arm. Professor Fahringer stated that Professor Narumanchi alleged Professor Fahringer would be told how to vote on a proposed departmental reorganization

which would have resulted in the establishment of a separate department of accounting; a result Professor Narumanchi opposed. Instead Professor Fahringer taught his assigned class.

15. Professor Fahringer wrote numerous memoranda to Chairman Buck about what was going on in the department. They went unanswered but Professor Narumanchi attempted to prevent Fahringer's writing to the chairman and told him he must take up his concerns with the accounting coordinator, Professor Mehta. At that point Professor Fahringer began writing Dean Anisman. Professor Buck brought pressure to bear on Professor Fahringer to prevent him from discussing his complaints about departmental management with Dean Anisman.

16. Professor Narumanchi directed Professor O'Hara to use a specific textbook in the Principles of Accounting

and Introduction to Accounting courses.

17. Professor Mehta directed Professor O'Hara to add more problems to the syllabus she prepared for a course. Professor O'Hara felt that the syllabus was appropriate as originally written but believed she was compelled to do as directed. All other instructors in the 17 sections of the course were then told to use the revised syllabus.

18. At her hiring interview with Narumanchi and Mehta Professor O'Hara presented her expired Georgia accountancy license and her CPA certificate. At that time she explained that she had let her license expire because she was not practicing or planning to practice. At that time Narumanchi and Mehta recommended O'Hara be hired. Later, Narumanchi publicly accused Professor O'Hara of not being a CPA and demanded she be terminated for falsification of credentials.

Dean Anisman investigated and found these charges untrue. The next year Narumanchi renewed his charges and also brought them to the attention of Georgia accountancy board. The Georgia board dismissed Narumanchi's charges and has renewed Professor O'Hara's license. Narumanchi's charges have also appeared widely in Connecticut newspapers.

19. Professor Narumanchi directed Professor Abdelsayed to sue a standardized test in place of another test Professor Abdelsayed preferred.

20. Even though the full time alloted by the university had not elapsed and Professor Abdelsayed wished to allow more time to his students, at a joint final exam session Professor Mehta demanded that Professor Abdelsayed's students hand in their exams at the same time his did.

21. Professor Abdelsayed was criticized on his annual evaluation, done by

Professors Narumanchi and Mehta, for using an overhead projector instead of the blackboard. The overheads were produced by the textbook publisher and Professor Abdelsayed considered them to be appropriate for what he was teaching.

22. In December 1984, during a period when the question of recall of Professor Narumanchi as faculty senator was under consideration, Professor Narumanchi threatened Professor Abdelsayed with a lawsuit if he joined with others in voting for the recall.

23. After being verbally offered the position, and before he had received an official letter of appointment, Professor Abdelsayed was called at home, in New York, by Narumanchi and Mehta and pressured to write a letter in support of a particular candidate for President of Southern. At the same time Professor O'Hara received a similar call.

CONCLUSIONS

Academic Freedom has been defined as the

> "right to teach as one sees fit, but not necessarily the right to teach evil". (p. 11, Black's Law Dictionary, 5th ed., 1979).

We are not dealing here with a question of teaching evil, therefore this case revolves around the right to teach as one sees fit. The act of teaching can be broadly defined as

> "to impart knowledge by means of lessons; to give instruction in; communicating knowledge; introducing into or impressing on the mind as truth or information and may be done as well through written communications, personal direction, through the public press, or through any means by which information may be disseminated, or it may be done by the adoption of sentiment expressed or arguments made by others which are distributed to others for their adoption and guidance" (p. 1311, Black's Law Dictionary, 5th ed., 1979).

The contract under which this complaint is brought in article 4.2.1 states

> All members of the bargaining unit are entitled to full freedom in research and in the publication of the results, subject to the adequate

> performance of their other academic duties. Freedom in research is fundamental to the advancement of truth. Members are also entitled to freedom in the classroom in discussing their assigned subjects. Members participate as representatives of a learned profession, of an educational institution, and of society at large. When they speak or write as members of society, they are free from institutional censorship or discipline, but their special position in the community imposes special obligations. As persons of learning and educational leaders, they should remember that the public may judge their profession and their institution by their utterances. Hence they should exercise appropriate restraint, show respect for the opinions of others, and make every effort, where appropriate, to indicate that they do not speak for The Connecticut State University.

Article 4.2.2.1 further states

> All members when teaching shall have professional freedom to conduct their courses, provided that the subject matter is that which has been specified by the University and the appropriate department.

In accordance with accepted practice in academe, colleagues make collective decisions on who may teach, what subjects shall be taught and, in certain circum-

stances, they also may decide on the use of common texts and examinations.

It is well established that the pursuit of learning only flourishes when, within necessary collegial constraints, the teacher and learner are left free to pursue truth. Thus, the burden of restricting faculty in the profession of truth is very serious; not to be undertaken lightly. It certainly may not be assumed without adequate safeguards and collegial consent. In the absence of such limitations, restrictions on the use of textbooks, examinations and unilateral manipulation of teaching schedules can only be construed as attempts to infringe upon the freedom to teach of the teacher so affected.

DISCUSSION

The committee notes that all respondents, having acknowledged receipt of due notification of these proceedings, did

not appear and participate. Necessarily, therefore, this Committee reached its decisions on the basis of the testimony, exhibits and arguments of the complainants presented at the scheduled hearing.

The essence of the complainants case is that Professors Narumanchi and Mehta, using their power as the Accounting and Finance Department DEC, improperly and without collegial authority interfered with the teaching of the complainants. The complainants further argue that Professor Mehta's position as departmental coordinator of accounting was not collegially approved and that Chairman Buck improperly protected Professors Narumanchi and Mehta in their abuse of authority, rather than stopping it.

On the basis of the testimony and exhibits before us, we find a clear pattern of deliberate acts in violation of the complainants' academic freedom by

the attempts of Professors Narumanchi and Mehta to impose the use of specific textbooks and examinations without prior collegial authorization by the members of the department. It is also clear that Professor Mehta and Professor Narumanchi, with Chairman Buck's acquiesence, manipulated departmental teaching assignments to their own benefit and to the deteriment of the complainants. As the Departmental Evaluation Committee, Narumanchi and Mehta used their power to punish the complainants for refusal to comply with their wishes both in the areas of teaching technique (including the use of specific texts and examinations) and university politics.

DECISION

The academic freedom of the complainants has been violated by the actions of the respondents cited above.

ORDER

The administration of Southern Connecticut State University shall devise alternative evaluation committees at the departmental and university level whenever not doing so would place any of the respondents in a position to evaluate or have any authority over any of the complainants.

All evaluations of and all pejorative statements about the complainants made by the respondents contained in the personnel files of the complainants shall be expunged from the record by the administration of Southern Connecticut State University.

Professors Buck, Mehta and Narumanchi are directed to cease and desist in their attempts to restrict the academic freedom

of Professors Abdelsayed, Fahringer and O'Hara.

Barbara Bard, Chairperson

Jerry Bannister

Michael K. Becker

Doris Griscom

Frank E. Muska

Michael E. Pernal

APPENDIX K

U. S. CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 56 - SUMMARY JUDGMENT

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary

judgment in the party's favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all

papers or parts thereof referred to in an affidavit shall be atached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or

may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; January 21,1963,eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

TITLE 42

Sec. 1983 - CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. Sec. 1979; Pub. L. 96-170, Sec 1, Decebmber 29, 1979, 93 Stat. 1984.

Sec. 1985. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or

indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as a elector for Prsident or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do , or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or

property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. Sec. 1980.

SUPREME COURT, U.S.
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CLERK

No. 87-1978

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,
Petitioners,

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTON, KERRY GRANT, BARBARA BARD, MICHAEL R. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether summary judgment can be granted before any discovery in free speech and civil rights actions?

2. Whether the Court of Appeals erred when it affirmed the District Court's decision dismissing the petitioners' claims since they had failed to exhaust their administrative remedies?

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was rendered upon a summary order which the court directed would not be published in the Federal Reporter and in which it stated that the decision should not be cited or otherwise relied upon in unrelated cases before that or any other court. (Appendix C to Petition, p. 010A).

The decision of the District Court is also unreported. It appears as Appendix D to the Petition for Writ of Certiorari, p. 011A.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 9, 1987. A petition for rehearing was filed on December 29, 1987. The petition for rehearing was denied on March 1, 1988. The petition for writ of certiorari was filed on May 31, 1988.

28 U.S.C. § 2101 provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Rule 20.4 of the Supreme Court Rules states further that:

> The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

Pursuant to Rule 40 of the Rules of Appellate Procedure "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." The petition for rehearing here was filed twenty days after the entry of the judgment. It was, consequently, untimely. The petition was denied without comment by the Court of Appeals. (Appendix A to Petition, p. 001A). It is a well-established rule that "where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended." *Pfister v. Northern Illinois Finance Corporation*, 317 U.S. 144, 150 (1942).

Even assuming the filing of the request for rehearing did extend the time for the filing of the petition for writ of certiorari, the petition was still untimely filed. The petition for rehearing was denied on March 1, 1988 and the petition for writ of certiorari was filed on May 31, 1988, 91 days after the denial of the petition. When a petition for writ of certiorari is untimely it should be dismissed. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952).

Thus, the Court lacks jurisdiction of the petition and it should be dismissed.

STATEMENT OF THE CASE

In addition to the facts stated by the petitioners, this action, commenced September 4, 1986, was consolidated, at the request of the parties, with *Narumanchi v. Board of Trustees*, Civil Action No. H-86-51(PCD). That action had been commenced in January, 1986 and an expedited scheduling order was entered therein requiring that discovery be concluded by February 14, 1986. In light of the delay that had already occurred in the case, the court granted the plaintiffs' motion to amend in *Mehta* on December 10, 1986 subject to the condition that there be no further discovery. (Appendix E to Petition pp. 021A–022A). In any event, the plaintiffs had from September 4, 1986 to December 10, 1986 to conduct discovery. No discovery by the plaintiffs was conducted during that time.

On appeal to the United States Court of Appeals for the Second Circuit the plaintiffs raised only one issue: "Whether the District Court erred in employing summary judgment criteria to a motion pursuant to Fed. R. Civ. P. 56 when the movants failed to submit an affidavit, admissions or depositions in support of their motion on the constitutional claims."

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the Questions Presented in the petition.

The two questions presented in the petition are whether a summary judgment motion may be granted without prior discovery in an action raising constitutional claims and whether administrative remedies need to be exhausted in a claim raising constitutional and federal rights. But the Second Circuit did not decide these questions in this proceeding. Moreover, the facts of record will not support a determination of those questions by this Court.

A review of the one issue raised by the plaintiffs on appeal to the Second Circuit was the alleged failure of the defendants to submit an evidentiary affidavit with their summary judgment motion.

Plaintiffs did *not* raise, as they do now, that discovery must precede entry of summary judgment, nor did they timely preserve the issue of administrative exhaustion. Indeed a review of the Second Circuit's succinct opinion clearly reveals that the appellate court addressed the one issue which plaintiffs did raise, to wit, the alleged technical deficiency of the defendants' summary judgment motion in light of Fed. R. Civ. P. 56. The Second Circuit's opinion mirrors the issue raised by plaintiffs. As the Court of Appeals stated in affirming the District Court's judgment:

> 1. Appellants claim that summary judgment should not have been granted against them because their complaint was facially sufficient and therefore able to withstand a summary judgment motion accompanied by only an allegedly irrelevant affidavit. We do not think the affidavit submitted was irrelevant since it rebutted allegations of racial discrimination, denial of equal protection, and lack of due process.

2. Appellants claim that the district judge never ruled on their first amendment claims. However, we find that in its opinion dated January 28, 1987, the district court incorporated its ruling on that subject in the related case of Narumanchi v. Board of Trustees, H-86-51(PCD).

3. We affirm for the reasons given in Judge Dorsey's January 28, 1987, opinion. We have considered all of appellants' arguments for reversal and find them meritless.

Mehta v. Board of Trustees, Dk. No. 87-7504 *slip op.* (2d Cir. 1987), (Appendix A to Petition, pp. 003 at 005).

It is a well-settled rule of appellate practice that courts will not review on appeal an issue which was not raised in the trial court below. *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626, 636 (2d Cir. 1972) *appeal after remand* 547 F.2d 708 (2d Cir. 1976). Issues not raised in trial or on the pleadings cannot be presented for the first time on appeal, and a trial court should not be reversed on grounds that were never urged or argued below. *Country Fairways, Inc. v. Mottaz*, 539 F.2d 637 (7th Cir. 1976).

Plaintiffs waived their opportunity to preserve the questions raised in this petition. This is a simple case of faulty pleading and of a record that fails to preserve on appeal the questions which plaintiffs now seek to have this Court address. Based on both plaintiffs' failure to bring the issues to the attention of the District Court and Appellate Court below, and the very nature of the Second Circuit's opinion, limited to the one issue then raised by plaintiffs, denial of the petition by this Court is appropriate.

2. **Summary judgment may enter, under certain circumstances, without use of discovery, especially where petitioners had three months to conduct discovery and failed to do so.**

The complaint which is the subject of this petition was filed on September 4, 1986. More than three months passed during which plaintiffs had an opportunity to conduct discovery. On December 10, 1986, in ruling on plaintiffs' motion to file an amended complaint, the trial court granted the same on the condition that no *further* discovery would be permitted. This condition was premised on two vital facts. First, in January 1986 plaintiff Narumanchi filed an action against many of the same defendants claiming constitutional violations. *Narumanchi v. Board of Trustees*, Civil Action No. H-86-51(PCD). The *Narumanchi* complaint resulted in entry of a preliminary injunction against the State defendants and entry of an expedited scheduling order requiring discovery to be conducted by February 14, 1986. Despite the expedited scheduling order, Narumanchi filed several amendments to his complaint and, due to his lack of full compliance with discovery requests, was the subject of sanctions for delays in compliance with discovery. *Narumanchi v. Board of Trustees*, Civil Action No. H-86-51(PCD), *Ruling on Motion in Limine.*

Upon the filing of the *Mehta* complaint on September 4, 1986 the plaintiffs sought to consolidate this case with *Narumanchi*, which was granted by the trial court. In the *Mehta* complaint plaintiffs sought again to amend their original complaint which had been consolidated with *Narumanchi*. Since the original *Narumanchi* case had lingered for one year due to plaintiffs' delays and complaint amendments, the trial court, on December 10, 1986, allowed plaintiffs' counsel in *Mehta* the opportunity to amend their complaint but only on the condition that there be no further discovery. (Appendix E to Petition, p. 024A).[1] The United States District Court

[1] Petition incorrectly notes date of entry of order as December 16, 1986. It was filed on December 10, 1986.

had been lenient with plaintiff Narumanchi in Civil Action No. H-86-51(PCD) in allowing ample time for discovery. Indeed, in the appeal at bar, Civil Action No. N-86-302(PCD), plaintiffs had three months to conduct discovery up to Judge Dorsey's ruling on December 10, 1986. *Id.*

Against this important factual background petitioners' first question may be addressed.

Petitioners make no reference in their brief to the more than three months they had to conduct discovery. Moreover they conveniently omit the facts that they moved to consolidate this case with *Narumanchi* and the expedited discovery order imposed in the *Narumanchi* proceeding. Despite these facts plaintiffs sought to sit on their right to engage in discovery for more than three months until finally, on December 10, 1986 the District Court prohibited any further discovery. The unrebutted facts make clear that there was no abuse of discretion by the court.

This Court has held that a summary judgment motion may be granted without discovery based on the particular record before the trial court. *Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034 (1987). In rejecting a claim that "some discovery would be required before Anderson's summary judgment motion could be granted" the Court held that the particular facts of a case dictate whether summary judgment should enter. *Id.* at 3042. *Anderson* dealt with a qualified immunity question insofar as the defendant was an FBI agent and the defendant moved for summary judgment on qualified immunity grounds. The Court noted:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery.

Id. at 3042, pg. 6.

The petitioners here would have this Court believe that they were deprived of the opportunity to conduct discovery when in fact they had such an opportunity but did not utilize it. The District Court did not bar further discovery until December 10, 1986 with the passage of more than three months from the filing of the action on September 4, 1986. Nothing prevented Mehta and Narumanchi from conducting further depositions or serving additional interrogatories during that time. Their failure to conduct discovery, which was of their own doing, cannot now be heard to prejudice plaintiffs' ability to respond to the defendants' motion to dismiss or for summary judgment.

The real question posed is not whether summary judgment may enter "before discovery" but whether summary judgment may enter after plaintiffs have waived an opportunity for discovery. Such is not a substantial federal question but rather an issue so unique to the particular prosecution by the plaintiffs of this case so as to preclude review by this Court.

3. The availability of procedures set forth in a collective bargaining agreement may be considered by a trial court in determining a summary judgment motion, even when constitutional claims are raised.

Again it must be emphasized that the exhaustion issue raised here for the first time was not asserted by the plaintiffs before the trial court or the Court of Appeals and therefore, must be considered waived.

Assuming arguendo that plaintiffs' claim is timely, the trial court and the Court of Appeals correctly noted that plaintiffs had a wide array of contractually-bargained-for rights under the collective bargaining agreement. The issue raised is not one of great moment for the federal judiciary. Simply, as the decisions by both the trial court and the appellate court make clear, the summary judgment motion contained support-

ing affidavits and exhibits. Conversely, plaintiffs did not file any counter affidavits nor counter exhibits. Indeed, the plaintiffs' own opposing memorandum to defendants' motion to dismiss or for summary judgment was filed twelve days late. (Appendix D to Petition, p. 015A). Accordingly the trial court had an adequate basis upon which to enter judgment in favor of the defendants on the plaintiffs' claims, and the Second Circuit affirmed.

There is no substantial federal question presented, only one of lackluster prosecution of the plaintiffs' complaint and the attendant consequences of trivializing both Local and Federal Rules of Civil Procedure. Accordingly, plaintiffs' petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, ET AL., RESPONDENTS

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Supreme Court, U.S.
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CLERK

No. 87-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,
Petitioners,

vs.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTOWN, KERRY GRANT, BARBARA BARD, MICHAEL K. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, Individually and in Their Official Capacities,
Respondents.

SUPPLEMENTAL BRIEF

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SLIP OPINION OF SECOND CIRCUIT

DATED JUNE 20, 1988 1A - 15A

SUPPLEMENTAL BRIEF IN SUPPORT OF QUESTION ONE IN THE PETITION

Pursuant to Rule 22.5 of the Rules of the Supreme Court, petitioners supplement their brief so as to bring the Court's attention to an intervening decision of the Second Circuit in Narumanchi v. The Board of Trustees of the Connecticut State University, Michael J. Adanti, and Alan H. Leader, in Docket No. 87-7796, decided on June 20, 1988, Slip Opinion No. 1032 - August Term 1987. [Appendix L]. This opinion is hereafter referred to as Slip Opinion.

Petitioner Narumanchi is the only party in that case and is a party jointly with Mehta in the instant case seeking the Petition. The Appellees in Docket No. 87-7796 are all respondents in this Petition also, and thus it is incumbent on this Court to consider the Slip

Opinion for the purposes of deciding this Petition.

In the Slip Opinion written by Hon. Jon O. Newman, Circuit Judge, joined by Circuit Judges Van Graafeiland and Miner, the Second Circuit found the dismissal of Narumanchi's First Amendment claims to be error [Slip Opinion, at p. 4207], and reversed and remanded the case to the District Court for further proceedings.

In affirming the District Court's ruling in the instant case, the Second Circuit referred to Judge Dorsey's ruling in H-86-51(PCD) dated October 6, 1986, and found: "Appellants claim that the district judge never ruled on their first amendment claims.However, we find that in its opinion dated January 28, 1987, the district court incorporated its ruling on that subject in the related case of Narumanchi v. Board of Trustees, H-86-51 (PCD)".[Appendix B]. By the Slip opinion,

H-86-51 is reversed by the same Circuit Court relating to the First Amendment claims. Since the ruling that was incorporated was in error, the ruling that incorporated it should also be found erroneous. In the Petition for Certiorari, Petitioners have previously made reference to the then pending appeal before the Second Circuit at page 4 and in Foot note 2 at page 39 of their Petition. The ruling dated October 6, 1986, now partially reversed was set out as Appendix F, pages 23A - 66A in the Petition filed on May 31, 1988.

The present Second Circuit's opinion further reinforces the need for this Court to intervene and summarily reverse Judge Dorsey's order so far as it pertained to the dismissal of the First Amendment claims.

The Petition for Certiorari should be granted for correcting the

inconsistent opinions rendered by different panels of the Second Circuit in relation to the same Constitutional issue and involving the same parties. The faith in the judicial system should be restored by having uniform decisions by lower courts.

The inconsistencies which this Court should note are as follows:

1).In Donohue v. Windsor Locks Bd. of Fire Com'rs, 834 F. 2d 54, (2d Cir. 1987), a panel consisting of Circuit Judges, Kaufman, Pierce and Miner, reversed Judge Dorsey's ruling dismissing First Amendment retaliation claims by Summary Judgment. This decision was rendered on November 25, 1987.

2). Then, a panel consisting of Chief Judge Wilfred Feinberg and Circuit Judges Oakes and Pratt, affirmed the dismissal of First Amendment retaliation claims in Mehta and Narumanchi v. The

Board of Trustees, et al., , the subject matter of this Petition. That order was issued on December 9, 1987. A rehearing was denied and a mandate was issued on March 9, 1988. [Appendix C].

3).Now, on June 20, 1988, a panel consisting of Circuit Judges Van Graafeiland, Newman, and Miner, again reversed Judge Dorsey's ruling relating to First Amendment retaliation claims. [Slip Opinion].

While Narumanchi may have his day in Court in regard to some of his First Amendment claims when the case is tried on remand, the joint Petitioner Mehta will be deprived of his day in court by the erratic decisions of the Second Circuit. Unless this Court intervenes, Judge Dorsey and other federal judges find no direction as to the appropriate handling of First Amendment claims.

The above arguments refer to the

granting of summary judgment in First Amendment cases and not necessarily with discovery. Petitioners' argument in Question one in the Petition is further strengthened by the fact that the error was compounded in this case by the grant of summary judgment even before discovery.

This Court, in Sure-Tan, Inc. v. NLRB, 1984, 467 U.S.883, 104 S. Ct. 2803, 81 L. Ed. 2d 732, considered the argument that the First Amendment protected an employer's acts in retaliating against alien employees by reporting them to the Immigration and Naturalization Service after they had voted for a union even though such argument was not raised before the Court of Appeals and the NLRB. The significance of First Amendment rights was thus properly noted by this Court in Sure-Tan and numerous other cases. The First Amendment issue in this

case is squarely before this court and petitioners will be deprived of their constitutional rights not only at the hands of the respondents as alleged in the Amended Complaint but also at the hands of the Judiciary unless the Petition is granted and Judge Dorsey's ruling summarily reversed.

The argument herein is fairly encompassed in the first question presented in the Petition. Since Mehta also alleged a violation of First Amendment rights, he should not be barred from obtaining relief merely because of a misreading of the Constitution by the lower courts. Petitioners respectfully pray that the Writ of Certiorari be issued.

PETITIONERS

New York, NY
June 30, 1988

By: KRISHNA M. VEMPATY
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APPENDIX

APPENDIX L

RULING OF THE UNITED STATES

COURT OF APPEALS

(June 20, 1988)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1032 - August Term 1987

Argued: April 12, 1988

Decided: June 20, 1988

Docket No. 87-7796

RADHA R. M. NARUMANCHI

Plaintiff - Appellant

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITY, MICHAEL J. ADANTI, and ALAN H. LEADER,

Defendants - Appellees,

DAVID C. NEWTOWN, KERRY GRANT, BARBARA BARD, MICHAEL L. BECKER, FRANK E. MUSK,

JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, individually and in their official capacities,

Defendants,

Before: VAN GRAAFEILAND, NEWMAN, and MINER, Circuit Judges.

Appeal from a judgment of the District Court for the District of Connecticut (Peter C. Dorsey, Judge) dismissing procedural due process and First Amendment claims in a suit by a professor against officials of a state university.

Affirmed as to dismissal of procedural due process claim; reversed and remanded as to dismissal of First Amendment claim.

Krishna M. Vempaty, New York, N.Y. (Howard R. Birnback, Sulkow, Birnback, Jasilli & Schleifer, New York, N.Y.; Altschuler, May & Stanek, Seymour, Conn., on the brief), for plaintiff-appellant.

Thomas P. Clifford, III, Asst. Atty. Gen., Hartford, Conn. (Joseph I. Lieberman, Atty. Gen. Robert W. Garvey, Asst. Atty. Gen., Hartford, Conn., on the brief), for defendants-appellees.

JON O. NEWMAN, Circuit Judge:

Radha Narumanchi, a tenured professor at the Southern Connecticut State University ("SCSU" or "the University") appeals from a judgment of the District Court for the District of Connecticut (Peter C. Dorsey, Judge) dismissing his claim that disciplinary actions taken against him by the University violated his rights under the First Amendment, the Due Process Clause of the Fourteenth Amendment, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec 2000e et seq. (1982). The Title VII claim was

resolved in favor of the University after a bench trial in a part of the judgment not challenged on appeal. Narumanchi contends that the District Court erred, however, in dismissing his constitutional claims on the ground that he had refused to avail himself of the grievance procedures established in the collective bargaining agreement between his union and his employer. We affirm that aspect of the judgment dismissing the due process claim but reverse the dismissal of Narumanchi's First Amendment claim.

Narumanchi is an American citizen of Asian Indian extraction and a tenured professor in the School of Business Economics at SCSU. His complaint alleges that the defendants-appellees have subjected him to disciplinary action on account both of his race and his vocal opposition to various policies and practices of the University. The

disciplinary action included a two-week suspension without pay, which the University contends was imposed because of Narumanchi's refusal to permit a formal classroom evaluation following complaints from students that his classes were conducted in an unprofessional manner. Narumanchi also complains of actions allegedly taken by the defendants to prevent him from participating in various departmental administrative functions and "reprimands" from University officials allegedly damaging to his professional reputation.

On August 13, 1985, the Chairperson of the Department of Accounting at SCSU informed Narumanchi that his classroom teaching would be evaluated in accordance with Article 4.13 of the Collective Bargaining Agreement (the "Agreement") between the University and the Connecticut State University Association of

American University Professors ("the Union"), the SCSU faculty's exclusive bargaining agent. However, Narumanchi refused to admit the faculty evaluation teams on a number of occasions, claiming that the evaluation procedures were in violation of the Agreement. On November 1, 1985, Narumanchi was warned by the Dean of the School of Business Economics, Alan H. Leader, that his actions constituted a serious breach of his responsibilities under the Agreement and that further refusals to cooperate would result in disciplinary measures. Dean Leader wrote to Narumanchi again on November 12 after yet another evaluation team had been refused entry to Narumanchi's classroom. This letter notified Narumanchi, pursuant to Article 15.3.2 of the Agreement, that the University intended to suspend him without pay for a period of two weeks as

a result of his conduct. The letter quoted from the Agreement, stating that Narumanchi "may contest said intent to suspend through the grievance system beginning at Step 3" by filing a formal grievance within five days. A Step 3 hearing is presided over by the President of SCSU and the President of the Union and is final and binding when both concur in the appropriate disposition of the grievance. The Step 3 hearing was initially scheduled for November 26, 1985, and then postponed at Narumanchi's request until December 3, 1985. Narumanchi filed the pending action in the interim, and he failed to appear at the December 3 hearing. His absence from the December 3 proceeding was deemed a waiver of his grievance, and Narumanchi's suspension was imposed soon thereafter.

On defendants' motion for summary judgment, the District Judge permitterd

Narumanchi's Title VII claim to proceed to trial but dismissed his claim under the First and Fourteenth Amendments in light of Narumanchi's failure to utilize the grievance procedures provided in the Collective Bargaining Agreement. Narumanchi contends on appeal that this disposition is contrary to the rule of Patsy v. Board of Regents, 457 U.S. 496 (1982), which held that a plaintiff bringing suit under 42 U.S.C. Sec 1983 is not required to exhaust state administrative remedies.

1. Due Process. Appellant's contention is without merit as it relates to the procedural due process claim because it misperceives the legal framework under which a claim is analyzed. The analysis proceeds in two steps. The threshold issue is always whether the plaintiff has a property or liberty interest protected by the Constitution. See Board of

Regents v. Roth, 408 U.S. 564 (1972). If a protected interest is identified, a court must then consider whether the government deprived the plaintiff of that interest without due process. The second step of the analysis thus asks what process was due to the plaintiff, and inquires whether that constitutional minimum was provided in the case under review. See Mathews v. Eldridge, 424 U.S. 319 (1976).

In the present case, the District Judge adhered to this framework. Judge Dorsey did not dismiss Narumanchi's due process claim as a threshold matter on "exhaustion of remedies" grounds. Rather, after properly determining that SCSU's decision to suspend Narumanchi without pay implicated a protected property interest, see Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Bailey v. Kirk, 777 F.2d 567

(10th Cir. 1985), the Judge found that the grievance procedures contained in the Agreement provided whatever process Narumanchi was due as a matter of federal law. Patsy is irrelevant to this holding. See Campo v. New York City Employees' Retirement System, 843 F.2d 96, 103 (2d Cir. 1988); Marino v. Ameruso, 837 F.2d 45, 47 (2d Cir. 1988); Lewis v. Hillsborough Transit Authority, 726 F.2d 668, 669-70 (11th Cir.) (per curiam) (denying petition for rehearing), cert. denied, 469 U.S. 822 (1984).

The conclusion should hardly be surprising that the limited procedural rights guaranteed under the circumstances of this case are satisfied by the pre-deprivation notice and hearing rights provided in the grievance procedures under the Agreement. See Costello v. Town of Fairfield, 811 F.2d 782, 786

(2d Cir. 1987) (Van Graafeiland, J., concurring) (finding post-deprivation arbitration of grievances under collective bargaining agreement satisfied due process); Lewis v. Hillsborough Transit Authority, 726 F.2d 664, 667 (11th Cir. 1983) (per curiam), reh'g denied, 726 F.2d 668 (11th Cir.), cert. denied, 469 U.S. 822 (1984); Jackson v. Temple University, 721 F.2d 931, 933 (3d Cir. 1983); Winston v. United States Postal Service, 585 F.2d 198, 209-10 (7th Cir. 1978). Narumanchi has not asserted any reasonable basis for finding the grievance procedures inadequate. His assertion of inevitable bias and partiality in a forum whose composition is specified by the terms of a collective bargaining agreement is unsupported. Narumanchi's failure to submit to the grievance procedures precluded consideration of the fairness of those proceedings

in practice. Cf. Parrett v. City of Connersville, 737 F.2d 690, 697 (7th Cir. 1984) (finding that union grievance machinery, though not "inherently inadequate", did not satisfy due process "as administered in the present case"), cert. dismissed, 469 U.S. 1145 (1985). Dismissal of appellant's due process claim was proper under the circumstances of this case.

2. First Amendment. The dismissal of appellant's First Amendment claim rests upon a different footing. The claim is based on Narumanchi's allegations that the disciplinary action taken against him was motivated in part by his vocal opposition to the reorganization of the SCSU School of Business Economics and to the renewal of Professor Martha F. O'Hara's employment at SCSU. The District Court initially considered the sufficiency of this claim under the test

set forth in Connick v. Myers, 461 U.S. 138 (1983), and found that Narumanchi had made an adequate showing that (a) his speech dealt with issues of "public concern", (b) on balance, it appeared that the speech did not compromise the efficient functioning of the University, and (c) it could be found that the speech was a substantial or motivating cause of the adverse action, see Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977). Judge Dorsey concluded that Narumanchi "has sufficiently pleaded a first amendment claim." Ruling of October 2, 1986, at 12. Nevertheless, the Judge dismissed the First Amendment claim as "premature," applying the same reasoning used to dismiss the due process claim discussed earlier.

Dismissal of the First Amendment claim was error. First Amendment rights, in

contrast to those rights protected by the procedural component of the Due Process Clause, are substantive in nature. As such, they may not be infringed regardless of the procedural "protection" accompanying the deprivation. "It is no defense to a claim of infringement of the liberties protected by the First Amendment that the procedure was fair, but it is a defense to a claim of deprivation of property, since such a deprivation is permitted by the due process clause provided there is no denial of due process." Parrett v. City of Connersville, supra, 737 F.2d at 697. Nor is it permissible, in light of Patsy v. Board of Regents, supra, to require initial recourse to available state proceedings, including union grievance proceedings, for the enforcement of First Amendment rights protectable in federal court pursuant to section 1983. See

Clark v. Yosemite Community College District, 785 F.2d 781, 790 (9th Cir. 1986); Hochman v. Board of Education, 534 F.2d 1094 (3rd Cir. 1976).

The judgment of the District Court dismissing the Fourteenth Amendment procedural due process claim is affirmed. Dismissal of the First Amendment claim is reversed, and the case is remanded for further proceedings.

Supreme Court, U.S.
FILED
JUL 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1978

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,
Petitioners,

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTON, KERRY GRANT, BARBARA BARD, MICHAEL R. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,
Respondents.

RESPONDENTS' REPLY BRIEF TO PETITIONERS' SUPPLEMENTAL BRIEF WITH ATTACHED APPENDIX

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ADDITIONAL REASON WHY THE PETITION SHOULD BE DENIED

1. The Second Circuit Denied Petitioner's Request For A Rehearing *En Banc* Following Its Decision In *Narumanchi.*

Petitioner in his supplemental brief seeks to have this Court decide whether the Second Circuit Court of Appeals erred in affirming the district court's decision in *Mehta v. Board of Trustees,* DK. No. 87-7504 (December 9, 1987). (Appendix A to Petition pp. 003–005). As grounds in support of his petition he claims that the Second Circuit's decision in *Mehta* is at variance with its decision in *Narumanchi v. Board of Trustees,* DK No. 87-7796 (June 20, 1988). (Appendix L to Supplemental Brief p. 0001A). In *Narumanchi* the Court of Appeals affirmed in part and reversed in part the decision of the district court in ruling on a motion to dismiss and motion for summary judgment. *Id.*

The appeal in *Narumanchi* is to be distinguished from the appeal in *Mehta.* Not only are they two separate and distinct cases but, more important, the two cases raised entirely separate issues on appeal. As noted, *Mehta* raised one issue before the Second Circuit, i.e. the alleged failure of the defendants to submit an evidentiary affidavit with their summary judgment motion. This is to be distinguished from the issue raised in *Narumanchi,* to wit: whether it was error to dismiss a § 1983 claim because plaintiff failed to exhaust his administrative remedies. (Appendix L to Supplemental Brief p. 008A).

Moreover, petitioner fails to inform this Court in his supplemental brief that he, on April 28, 1988, moved for leave to file for a rehearing *en banc* out of time, following the Second Circuit's affirmance of *Mehta.* The Court of Appeals denied this motion on June 21, 1988, one day after its affirmance in part and reversal, in part, of *Narumanchi.* Obviously the Second Circuit was aware of the *Narumanchi* ruling and it did

not merit the granting of a rehearing *en banc* by the Second Circuit in *Mehta*. (Appendix 1).

Accordingly, the petition for writ of certiorari should be denied.

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APPENDIX 1

Second Circuit Rule 27(a) governing use of this form is reprinted on reverse of Page 2. Note requirement that supporting affidavits be attached.

United States Court of Appeals
FOR THE SECOND CIRCUIT

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,

Plaintiffs-appellants

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, ET AL.,

Defendants-appellees

Use short title

87-7504

Docket Number

NOTICE OF MOTION

state type of motion

for leave to file suggestion for rehearing in banc out of time

MOTION BY: *(Name, address and tel no of law firm and of attorney in charge of case)*

KRISHNA R. VEMPATY
1123 Broadway Suite 302
New York, N.Y. 10010
(212) 242 3333

OPPOSING COUNSEL: *(Name, address and tel no of law firm and of attorney in charge of case)*

JOSEPH I. LIEBERMAN, ESQ.
110 Sherman Street
Hartford, CT 06105
Attn: Thomas P. Clifford III, Esq.

Has consent of opposing counsel:
- A. been sought? ☐ Yes ☒ No
- B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set: Already argued
- A. by scheduling order? ☐ Yes ☐ No
- B. by firm date of argument notice? ☐ Yes ☐ No
- C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:

Hon. Peter C. Dorsey of the U.S. District Court, Connecticut.

1A

Brief statement of the relief requested:

Leave to file suggestion for rehearing in banc out of time.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Krishna M. Vempaty

Signed name must be printed beneath

KRISHNA M. VEMPATY

Appearing for: *(Name of party)*

April 28, 1988

Date

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is ~~granted~~ denied

UNITED STATES COURT OF APPEALS
FILED
JUN 21 1988
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

JUN 21 1988

Date

Circuit Judge

2A

Supreme Court, U.S.
FILED
AUG 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,
Petitioners,

vs.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTOWN, KERRY GRANT, BARBARA BARD, MICHAEL K. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, Individually and in Their Official Capacities,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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This Reply Brief is submitted in response to Respondents' Brief in Opposition filed with this Court.

OBJECTIONS TO JURISDICTION

Respondents in their Brief in Opposition objected to the jurisdiction of this Court on the basis that Petitioners did not file the petition for writ of certiorari within 90 days from the time the Petition for Rehearing was denied.

They now question the timeliness of the Petition for Rehearing in the Court of Appeals. Both objections are without merit. Petitioners fully complied with Supreme Court Rule 20.4. The judgment of the U.S. Court of Appeals was entered on December 9, 1987. Within 14 days from that day, on December 24, 1987, Petitioners filed their petition for rehearing and not on December 29, 1987, as alleged by Respondents.

Petitioner's attorney verified his own records and the Court of Appeals records and obtained a certified copy of the Docket Sheet. The relevant item in the Docket Sheet reads "Appellants Mohan L. Mehta & Radha R.M. Narumanchi petition for rehearing filed w/pfs." against date 12-24-87.

Since a timely petition for rehearing was filed and entertained by the Court of Appeals and not rejected as untimely, and since Respondents failed to object any alleged untimeliness when the petition for rehearing was filed, their objection now is meritless.

Respondents also failed to properly calculate the 90 day period. The petition for rehearing was denied on March 1, 1988 and the time for filing the writ petition then commenced. However, the 90th day fell on a federal holiday, the Memorial Day, May 30, 1988. The Supreme Court also was closed on that

day. Under Rule 29.1 of the Supreme Court Rules, Petitioner filed the petition on the following day, May 31, 1988. The Petition was duly accepted by the Clerk of the Supreme Court. Respondents' objections are totally baseless.

OTHER OBJECTIONS OF RESPONDENTS

The first reason propounded by Respondents for the denial of the petition is that the Petition raised new issues not presented below. They do not dispute that the granting of the summary judgment was questioned. Petitioners contend that the failure to have discovery was fully encompassed in the objections to the summary judgment. Further, once the summary judgment was granted and the case dismissed, there is no way plaintiffs could raise an issue with the District Court. The prior

appellate counsel did not fully develop the issues before the Second Circuit, but questioned the validity of the summary judgment. Since a substantial federal procedural issue is involved, this legal issue can be decided by this Court.

Even assuming the discovery issue to be a new one, this Court's power to notice "plain error" is evident from Rule 40(1)(d)(2) of the Supreme Court Rules. At times the Court has raised a new question sua sponte and directed the parties to argue it. C.Wright, A. Miller & Kane, Federal Practice and Procedure, Vol 10A, p. 518. This Court noticed plain error in Washington v. Davis, 426 U.S.229, 238 (1976) and other cases.

The ninth Circuit recently dealt with this issue in State of Cal., Dept. of Educ. v. Bennett, 843 F. 2d 333, 339 (9th Cir. 1988). After stating the general principle that appellate courts do not, as a rule, consider an issue for

the first time on appeal, the Court summarized three execptions.

> "(1) 'the 'exceptional' case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process';
> (2) 'when a new issue arises while appeal is pending because of a change in the law';
> (3) 'when the issue presented is purely one of law and either does not depend one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed'."

The citations were omitted in the original. Other courts have also followed these exceptions. Vintero Corp. v. Corporacion Venezolana De Fomento, 675 F. 2d 513, 515 (2d Cir. 1982); Payne v. McLemore's Wholesale & Retail Stores, 654 F. 2d 1130, 1144 (5th Cir. 1981). Further, this Court has previously ruled that federal appellate courts may resolve an issue not raised in the District Court where the proper resolution is beyond any doubt or where an injustice might otherwise result. Singelton v. Wulff, 428 U.S. 106, 121 (1976).

The three exceptions enunciated by the ninth Circuit in State of Cal. are fully applicable in this case, and the writ should be issued.

In relation to a prisoner discipline matter, the Second Circuit analyzed the need for discovery before summary judgment in Flaherty v. Coughlin, 713 F. 2d 10, 13 (2d Cir. 1983). In this case, the facts alleged in the amended complaint at least gave rise to a colorable suspicion of retaliation. "Such a claim sill support at least documentary discovery". Id. @ p. 13. Since no discovery was ever had in this case, this court should give authoritative ruling on this procedural issue.

Respondents also claimed that petitioners had three months time to conduct discovery and that they failed to do so. Petitioners diligently pursued their case but were overburdened with at least 11 motions in that three month

period and the docket sheet shows 32 entries in that period. In addition to this activity, petitioner Narumanchi was also pursuing his individual case before the same Judge and was preparing for trial on his title VII claim. Petitioners were prevented from pursuing discovery and they did not waive the right to have discovery.

Respondents finally argue that Petitioner had a wide array of contractually bargained for rights under the collective bargaining agreement and that there was no denial fo due process. Even if that be true, these procedures were enforced unequally. The bias of the enforcing authorities was demonstrated and petitioners did not receive the constitutional minimum under the due process clause. These issues will be fully discussed in Petitioners' Brief once the Writ is issued.

Respectfully submitted.

New York, N.Y.

August 10, 1988

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